Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

JAMES E. CECIL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF *CERTIORARI*

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12 January 2000

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QUESTIONS PRESENTED

I. Does an employer violate the National Labor Relations Act when it couples entry into a compulsory unionism provision requiring bargaining unit employees to become "members in good standing" in a union as a condition of employment, with attempts to force employees to become union members pursuant to the employer's understanding of the plain meaning of the terms of that clause?

II. Is a union, having negotiated a compulsory unionism provision requiring employees to become and remain "members in good standing" as a condition of employment, which the employer understands to require formal union membership, and having taken actions to require employees to become formal union members, entitled to retain any union dues paid by employees while the clause remained in the collective bargaining agreement?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner James E. Cecil was Charging Party before the National Labor Relations Board and filed the Petition for Review in the United States Court of Appeals for the Sixth Circuit.

Respondent National Labor Relations Board ("NLRB" or "the Board") was Respondent in the United States Court of Appeals for the Sixth Circuit.

Local 614, International Brotherhood of Teamsters ("Local 614") was a Charged Party and Respondent in proceedings before the NLRB, and was an Intervenor in the United States Court of Appeals for the Sixth Circuit.

Rochester Manufacturing Company ("RMC") was a Charged Party and Respondent in proceedings before the NLRB, but did not intervene in the proceedings before the United States Court of Appeals for the Sixth Circuit.

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IN THE

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No. 99-____

JAMES E. CECIL,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Petitioner James E. Cecil respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on 14 October 1999.

OPINIONS BELOW

The panel opinion sought to be reviewed (Appendix ("App.") A, *infra*, 1a) is unreported, while the affirmance is reported in a table published at 194 F.3d 1311. The Decision and Order of the National Labor Relations Board, and the Decision and Order of the Administrative Law Judge (App. B, *infra*, 9a) is reported at 323 N.L.R.B. 260 (1997).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on 14 October 1999. This Petition is filed within ninety (90) days of that date, and is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act ("NLRA," or "the Act"), 29 U.S.C. § 141 *et seq.*, are set out in Appendices C and D, *infra*, 58a-59a.

STATEMENT OF THE CASE

Jurisdiction Below. Petitioner James E. Cecil invoked the jurisdiction of the National Labor Relations Board ("NLRB" or "Board") under § 10 (a)-(c) of the NLRA, 29 U.S.C. § 160 (a)-(c), which authorizes the Board to prevent unfair labor practices. Cecil's unfair labor practice charges challenged the actions of Local 614, International Brotherhood of Teamsters ("Local 614") and Rochester Manufacturing Company ("RMC") to enforce a forced-unionism clause to compel employees to become formal members of Local 614. The General Counsel of the NLRB issued a consolidated complaint against Local 614 and RMC pursuant to §10(b) of the NLRA, 29 U.S.C. § 160(b).

The Board's Decision and Order was issued on 12 March 1997. That Decision and Order was a "final order" disposing of all issues. On 14 March 1997, Cecil filed a Petition for Review and invoked the jurisdiction of the United States Court of Appeals for the Sixth Circuit under § 10(f) of the NLRA, 29 U.S.C. § 160(f) (authorizing the filing of Petitions for Review by persons aggrieved by final decisions of the Board). The Court of Appeals' decision over which review is sought was issued on 14 October 1999. This Petition is filed within ninety (90) days of that date.

Statement of Facts and Proceedings Below. On 20 May 1992, James E. Cecil filed two unfair labor practice ("ULP") charges with the National Labor Relations Board's ("NLRB," or "the Board") Region 7 office, alleging violations of §§ 8(a)(1), (2), and (3), and §§ 8(b)(1)(A) and (b)(2) of the NLRA. 29 U.S.C. §§ 158(a)(1), (2), and (3) and §§ 158(b)(1)(A) and (b)(2). Upon those ULP charges, the General Counsel issued a Complaint on 7 August 1992, alleging violations of §§ 8(a)(1), (2), and (3), and §§ 8(b)(1)(A) and (b)(2), 29 U.S.C. §§ 158(a)(1), (2), and (3) and §§ 158(b)(1)(A) and (b)(2), of the Act. The Board, therefore, had subject matter jurisdiction under § 10(a) of the Act, 29 U.S.C. § 160(a).

A formal hearing was held on 16-17 November 1992 before Administrative Law Judge ("ALJ") Frank H. Itkin. The facts show that, when his charges were filed, Cecil had been an employee of RMC in the bargaining unit represented by Local 614 since 2 January 1985. He was not a member of Local 614, nor was he a member of that union at any time material hereto.

On or about 1 February 1992,[1] RMC and Local 614 entered into a collective bargaining agreement covering RMC's employees, which contains a "Recognition, Union Shop, and Dues" (forced-unionism) clause providing in pertinent part:

> The Employer agrees that as a condition of continued employment, all present and future employees covered by this Agreement shall become and remain members in good standing in Local Union No. 614, affiliated with the International Brotherhood of Teamsters of North America, no later than the 31st day following the beginning of their employment.

The language used in the forced-unionism clause was presented by Local 614.

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[1] Unless otherwise specified, all events occurred in 1992.

By letter dated 6 February from its agent, Kris Williamson, RMC sent all unit employees — including Cecil — a memorandum which contained "a Teamsters union 'check off authorization...' form ... which authorizes [RMC] to withhold union dues from your paycheck" and stated "that [it] **must be filled out**" and that "[d]ues payment is required for your continued employment" (original emphasis). At trial, Williamson testified that she sent this memorandum because "It was [her] interpretation of the Union's security clause [*sic*] of the contract, which requires that [employees] become and remain members in good standing." App. B at 28a-29a.

When they failed to respond, RMC sent another memorandum to Cecil and twenty-two (22) other bargaining unit employees stating that "membership in the Teamsters Local 614 (which includes the payment of monthly dues) is **a requirement** for continued employment at Rochester Manufacturing Company," and directing those employees to "fill out the form and return it to Kris Williamson in Human Resources, or to John Ireland, Union Steward no later than your Thursday (February 27) shift" (original emphasis). *Id.* at 29a.

Williamson testified at trial that she wrote the memorandum because she "thought the contract meant what it said." When Cecil spoke to Williamson on 26 February, asking whether RMC would fire him for refusing to sign the checkoff, Williamson responded that "the Company would not fire [Cecil], ... the Union would direct the Company to terminate [Cecil].... within 30 days." Williamson stated that RMC would terminate Cecil "[b]ecause [he] was not considered a member in good standing, because [he] had not signed the checkoff and paid the dues." That memorandum to employees also

> encourage[d] each and every[] [employee] to make every effort to attend that [union] meeting as your votes for steward and committee persons have a significant effect upon you as well as Rochester Manufacturing Company.
>
> Remember, a person that doesn't vote should have no complaint later.

App. B. at 29a-30a.

On or about 27 February, without authorization, RMC deducted union dues from Cecil's paycheck. RMC subsequently refunded to Cecil the money deducted. App. B at 30a; App. A at 2a.

On or about 10 March, Cecil had a conversation with Cecil Powell, Local 614's Business Agent. During this conversation, after Cecil stated that he refused to join the union, Powell threatened Cecil that "the full force of the Union, the UAW and the other unions would join with him, to come down on [Cecil]." Subsequently, Cecil received a letter (dated 20 March) from Local 614 demanding that he pay "monthly fees," defined as "monthly dues," to the union. One month later, Cecil received by certified mail a letter (dated 21 April) from Local 614 making a similar demand. Cecil received no other written communications from Local 614. Neither RMC nor Local 614 ever informed Cecil that he could not be required to become a "member in good standing," or pay fees equal to full union dues as a condition of continued employment with RMC. App. B at 30a-31a.

The undisputed Record illustrates that RMC engaged in similar conduct with its other employees. Michael Martin's resignation from union membership was conveyed to Local 614 and RMC, and he attempted to revoke his dues checkoff authorization. RMC denied Martin's request to revoke his dues checkoff authorization. Donald Culvey was misled into becoming a union member, and subsequently resigned from membership in Local 614 and revoked his dues checkoff authorization. RMC refused to honor that revocation. *Id.* at 33a.

It was upon these undisputed facts that ALJ Itkin and the Board reached their decisions. On 31 March 1993, ALJ Itkin issued a decision upholding the Complaint it its entirety. ALJ Itkin held that RMC,

> by advising its unit employees that union-checkoff authorization forms must be filled out and dues payment is required for their continued employment, and by advising

> its unit employees that membership in the Union is a requirement for continued employment, has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, and has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees thereby encouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act, as alleged.

Id. at 50a. ALJ Itkin concluded that RMC,

> by advising its unit employees that union-checkoff authorization forms must be filled out and dues payment is required for their continued employment, and by advising its unit employees that membership in the Union is a requirement for continued employment, has rendered unlawful assistance and support to the Union, in violation of Section 8(a)(1) and (2) of the Act, as alleged.

Id. Finally, ALJ Itkin held that RMC,

> by threatening to terminate employee Cecil because of his failure to be a "member in good standing in the Union," and by deducting union membership dues from his wages notwithstanding the absence of an authorization for the deduction and remittance of such dues, has further interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act, as alleged.

Id. at 50a-51a.

ALJ Itkin also found that Local 614 had violated §§ 8(b)(1)(A) and (b)(2) of the Act, 29 U.S.C. §§ 158(b)(1)(A) and (b)(2), by

> entering into and maintaining a collective-bargaining agreement requiring the unit employees to be "members in good standing" in the Union, by failing to advise Cecil and other nonmember unit employees concerning their limited

> membership rights as explained in *Beck*, supra, by threatening Cecil with reprisals because of his failure to join the Union and pay initiation fees and membership dues, and by later attempting to have Cecil pay initiation fees and dues without providing him with notice concerning his limited membership rights as explained in *Beck*, supra....

Id. at 51a.

As relevant to this Petition, ALJ Itkin ordered a number of remedies, including expunction of the offending clause and, because "the coercive impact of **attempts to enforce this language** was unitwide," directed "full restoration of the status quo ante ... to effectuate the purposes and policies of the Act," requiring RMC and Local 614 "to reimburse all unit employees for all dues and fees paid as a consequence of this unlawful clause and conduct, together with interest." *Id.* at 51a (emphasis added). All parties filed exceptions from ALJ Itkin's decision.

Nearly four years later, having first ruled upon a virtually identical case also arising in Region 7 a year later, *Paper Workers Local 1033 (Weyerhaeuser Paper Co.)*, 320 N.L.R.B. 349 (1995), *petition for review granted sub nom. Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *vacated & remanded*, 119 S. Ct. 442 (1998), the Board issued a Decision and Order reversing ALJ Itkin in part. *Rochester Mfg. Co.*, 323 N.L.R.B. 260 (1997); App. B, 9a.

The NLRB "reject[ed] the judge's finding of a violation" in that "Respondents entered into and maintained a collective-bargaining agreement containing a facially unlawful union-security clause requiring unit employees to be 'members in good standing' in the Union," but found that Local 614 "violated the Act by failing to provide notice to Charging Party James Cecil and other unit employees of their rights under *National Labor Relations Board v. General Motors*, 373 U.S. 734 (1963), and *Communications Workers v. Beck*, 487 U.S. 735 (1988)." App. B at 10a. The Board also declared that it found "no merit in the parallel allegation against" RMC. *Id.* The Board reasoned that:

> In light of the Union's obligations to apprise employees of their rights to be nonmembers and to apprise nonmembers of their right to pay less than full dues and fees, there is no warrant for declaring the union-security clause unlawful on its face. The clause is clarified by the required notices. Indeed, in this case, the remedial order will require the Union to give those notices.

Id. at 13a.

Based upon these conclusions, the Board dismissed all § 8(a)(2) allegations against RMC based upon "being a party to that clause," and dismissed the "related" § 8(b)(2) allegation against Local 614. *Id.* at 13a n.4.

The Board also dismissed all allegations against RMC and its efforts to compel membership in the union, finding a violation of § 8(a)(1) and (2), 29 U.S.C. § 158(a)(1) and (2), only in RMC's seizure of union dues absent Cecil's execution of a dues checkoff authorization card. It reasoned that RMC's efforts to compel its employees to become formal union members and pay full union dues did not violate the Act because "the statute uses the term 'membership,' and payment of dues can lawfully be made a condition of employment," and that, because "employers have no duty of fair representation, ... thus they are not under an affirmative obligation to spell out for employees the precise extent of the union-security obligation." *Id.* at 15a-16a.

The Board also rejected ALJ Itkin's proposed remedy, requiring only that Local 614 (not RMC), upon notice to employees and after objections, if any, "reimburse the objecting nonmember employees for the reduction in their dues and fees, if any, for nonrepresentational activities that occurred during the accounting period or periods covered by the complaint in which the nonmember employee has objected." *Id.* at 16a-19a. Cecil filed a Petition for Review.

On 14 October 1999, the court of appeals upheld the Board's decision and denied Cecil's petition for review. 194 F.3d 1311 (6th

Cir. 1999); App. A at 1a-8a. According to the panel, "[a]lthough the Board perhaps should have acknowledged more clearly the clause's role in misleading workers, it did find in the record several instances of unlawful coercion and misinformation by the Union and RMC, motivated in part by those parties' erroneous interpretation of the clause." *Id.* at 7a. Furthermore, the panel declined to disturb the Board's remedial order, holding that this Court

> has substantially circumscribed the amount of dues that objecting employees are required to pay. *General Motors* held that workers satisfy the "membership" requirement of a union security clause by paying the union's initiation fee and dues, while *Beck* limited this "financial core" membership to fees directly related to the union's representational activities. But the Court has never suggested that employees may exempt themselves entirely from any financial obligation, and Cecil presents us with no cogent argument as to why the Board erred in not requiring a total refund here.

Id. at 8a. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. CONGRESS' AUTHORIZATION TO NEGOTIATE "MEMBERSHIP" CLAUSES DOES NOT AUTHORIZE APPLICATION OF EMPLOYER COERCION TO FORCE EMPLOYEES TO BECOME FORMAL UNION MEMBERS.

In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), this Court addressed the "limits § 8(a)(3) places on the negotiation and enforcement of union-security agreements." 487 U.S. at 745. The Court reiterated that, "[t]aken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core.'" *Id.* (footnote omitted) (quoting *National Labor Relations Board v. General Motors*, 373 U.S. 734, 742 (1963)). The Court then determined that "this 'financial core' [does not] include[] the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Id.*

In *Marquez v. Screen Actors Guild*, 119 S. Ct. 292 (1998), this Court addressed whether "a union breach[es] its duty of fair representation merely be negotiating a clause that tracks the language of § 8(a)(3)." 119 S. Ct. at 299. While affirming the lower court's determination that negotiating a forced-unionism clause which tracks the statutory language does not violate the duty of fair representation, this Court, however, specifically noted that this was a "narrow question," and that it was "not deciding whether [the Screen Actors Guild] illegally enforced the union security clause to require petitioner to become a member of the union or to required her to pay dues for non-collective-bargaining activities." *Id.*

Recognition that this Court ruled only upon this "narrow question" prompted Justice Kennedy's observation (joined by Justice Thomas) that *Marquez* did not address "circumstances in which there is evidence that a security clause ... was used or intended to deceive or injure employees." *Id.* at 303. Also recognized in the two-Justice

concurrence was the fact that the clause "may have been used or intended to mislead a potential employer to the [employee's] detriment." *Id.* at 303-04.

That is precisely what happened in this case, the panel's protestations to the contrary, App. A at 7a, notwithstanding. *Compare*, App. B at 28a-34a (uncontroverted testimony of Kris Williamson). As a result, Petitioner's employer attempted to force him, and all RMC employees, to become formal union members, even encouraging them to attend union meetings.

A. The Conflict

The conflict among the Circuits, and indeed, even within the Circuit and Board themselves, is not the typical conflict alleged sufficient to justify the grant of *certiorari*. Instead, the conflict here is between this case — where the Board refused to find an employer violation in its undisputed attempts to force its employees to become formal union members — and those cases where the Board has vigorously attacked employer efforts to discourage formal union membership. In short, the conflict here is between this case, about an employer's unremedied effort to **en**courage collective activities, as compared to the vigorous prosecution of employers **dis**couraging employee collective activities.

When considered in this light, there is a wealth of conflicting authority. Courts and the Board regularly face the issue of employer coercion **against** union activity. Virtually every Circuit has held, pursuant to the plain language of the Act, 29 U.S.C. § 158(a)(1), that employer efforts discouraging union activity among their employees violate the Act. *National Conference of Firemen & Oilers, SEIU, AFL-CIO v. NLRB*, 145 F.3d 380, 383-84 (D.C. Cir. 1998); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993); *Bryant & Stratton Business Institute, Inc. v. NLRB*, 140 F.3d 169, 173 (2d Cir. 1998); *HarperCollins San Francisco*, 79 F.3d 1323, 1331 (2d Cir. 1996); *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1177

(3d Cir. 1989); *NLRB v. Hale Container Line*, 943 F.2d 394, 399-400 (4th Cir. 1991) (retaliation for union activity held to be unlawful); *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1318 (5th Cir. 1996); *Beverly Farm Found., Inc. v. NLRB*, 144 F.3d 1048, 1051-52 (7th Cir. 1998); *NLRB v. American Linen Supply Co.*, 138 L.R.R.M. (BNA) 2554, 2558 (8th Cir. 1994) (affirming finding of violation in employer's solicitation of withdrawal from union and assistance in filing withdrawal cards); *NLRB v. Auto Fast Freight, Inc.*, 793 F.2d 1126, 1131 (9th Cir. 1986); *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1033-34 (10th Cir. 1996); *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1421-22 (11th Cir. 1998).[2] Indeed, there is a conflict between this decision and the decisions of two different panels of the Sixth Circuit itself. Those other panels unambiguously found employer violations in the discouragement of union activity. *Vemco v. NLRB*, 79 F.3d 526, 530 (6th Cir. 1996); *Manimark v. NLRB*, 7 F.3d 547, 550-51 (6th Cir. 1993).

This conflict with other Circuits is aggravated by the Board's own conflict with its decisions finding violations in employer discouragement of union membership. The Board vigorously and promptly acts against employers who discourage their employees from exercising their rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. *See Ryder Truck Rental, Inc.*, 318 N.L.R.B. 1092, 1096 (1995) (employer unlawfully attempted to have transfers from union to non-union facility sign "yellow-dog contracts"); *Jerome Russo Quality Painting & Decorating, Inc.*, 309

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[2] A number of Circuits have also held that an action's mere tendency to coerce, regardless of its actual impact, violates the Act. *Freund Baking Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998); *see also NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 804 (1st Cir. 1995); *New York Univ. Medical Center v. NLRB*, 156 F.3d 405, 410-11 (2d Cir. 1998); *Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423 (4th Cir. 1999).

N.L.R.B. 973, 981 (1992) (same); *M & M Electric Co.*, 323 N.L.R.B. 361, 361 (1997) (finding illegal layoff occurring because of employee's union activity); *Nathan Katz Realty Co.*, 317 N.L.R.B. 73, 78 (1995) (employer unlawfully told employees not to contact any union); *Fun Connection & Juice Time*, 302 N.L.R.B. 740, 741 (1991) (employer violation in conditioning strikers' rehire upon union disavowal and withdrawal); *Mini-Togs, Inc.*, 304 N.L.R.B. 644, 644 (1991) (violation found in employer distribution of union withdrawal cards).[3]

The Board's willingness to prevent similar employer coercion where it is applied to **promote** union participation is not similarly in evidence, notwithstanding the Act's unambiguous prohibition of employer coercion, whether designed to promote or discourage union participation. 29 U.S.C. § 158(a)(1). Indeed, the Board's decisions on issues such as this appear designed to insulate employees from information from any source other than unions, the source least likely to inform truthfully and effectively employees of their right to refrain from union support and membership.[4] *See* App. B at 15a-16a; *see also Massillon Newspapers, Inc.*, 319 N.L.R.B. 349, 351 n.8 (1995) (citing employer for § 8(a)(5) violation, and ordering restoration of a "membership in good standing clause")

Thus, the Sixth Circuit's decision in this case is widely at variance with decisions among the Circuits concerning employer efforts to discourage union membership among their employees. The

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[3] Citation to every reported case in which the Board has found violations in employer **anti**-union activities would likely exhaust the limitations on the length of briefs imposed by this Court's rules.

[4] Similarly, the General Counsel has issued a complaint against an employer with the temerity merely to inform truthfully its employees of the limits of the lawful obligations which may be imposed upon them. *Beverly Health & Rehabilitation Serv., Inc.*, Case No. 6-CA-27453 (3/14/96), *cited in* Daily Labor Report, 3/26/96, page A-5.

Board's decision, and the panel's affirmance of it, effectively writes out of the Act Section 7's guarantee of a "right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title." 29 U.S.C. § 157. The statute unambiguously and even-handedly prohibits employer coercion both to promote or to discourage union membership. Nevertheless, by affirming the Board here, the Sixth Circuit joins, perhaps *sub silentio*, those Circuits which have specifically held that an employer commits unfair labor practices "only if its actions are motivated by anti-union *animus*." *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 741 (4th Cir. 1998); *McClain of Georgia*, 138 F.3d at 1423-24; *but see Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995) (anti-union motive not required to establish unfair labor practice).

B. The Importance of the Issue

This question is manifestly important, both in principle and in practice, as this Court recognized by granting *certiorari* in cases such as *Beck* and *Marquez*.

It is important in principle, because a requirement that employees join or pay full union dues as a condition of employment impairs an employee right explicitly guaranteed in NLRA Section 7 and a fundamental congressional policy imbedded in the Act. The employee right impaired is the "right to refrain from" union membership "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)]." 29 U.S.C. § 157 (1988). The fundamental congressional policy impaired is that of protecting employees' "full freedom of association," 29 U.S.C. § 151 (1988), and "the rights of individual employees in their relations with labor organizations," 29 U.S.C. § 141(b) (1988). More particularly, the policy impaired is "the congressional

policy of voluntary unionism" that is "implicit in § 8(a)(3)." *Pattern Makers v. NLRB*, 473 U.S. 95, 104-05, 114 (1985).

Whether NLRA Section 8(a)(1) and (3) permits employers to tell employees that "membership" in the union and payment of full union dues are required — although this Court has definitively interpreted the statute to authorize only "the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues,'" *Beck*, 487 U.S. at 762-63 (*quoting Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)) — is important in practice for two reasons.

First, the Court's resolution of this question potentially affects a large number of employers. Compulsory unionism agreements are lawful in twenty-nine states and the District of Columbia. *See* Lab. Rel. Rep. (BNA), *Labor Relations Expediter* 730:319 (Oct. 24, 1994). As former NLRB Chairman William B. Gould IV observed, "many or most collective bargaining agreements define 'membership,' which is a condition of employment in a union security agreement, as simply membership — and not the payment of periodic dues and initiation fees." William B. Gould IV, Campaign Finance Reform and the Union Dues Dispute Under *Beck*, Address to the Fall Meeting of the Iowa Chapter of the Industrial Relations Research Ass'n (Oct. 8, 1997), *in* NLRB Release-2259, at 3. According to one survey, "[u]nion shop provisions, requiring all employees in the bargaining unit to join the union and maintain membership as a condition of employment, appear in 64 percent of contracts." Lab. Rel. Rep. (BNA), *Labor Relations Expediter* 430:508 (Oct. 23, 1995).

Second, this Court's intervention is necessary to establish conclusively nationwide that employers and unions — while they are permitted to mimic the statutory language permitting a "membership" requirement in writing their forced-unionism agreements, *Marquez*, 119 S. Ct. at 302 — cannot lawfully require or attempt to require employees to become union members. As former NLRB Chairman

Gould explained, "[g]enerally speaking, neither workers nor employers understand that 'membership' is what the Supreme Court has defined it to be in its 1963 *General Motors* holding." Gould, *supra*, at 3; *see Electronic Workers Local 444*, 311 N.L.R.B. 1031, 1037 (1993), *modified sub nom. Electronic Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994); Harry H. Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1057-58 (1976).

Consequently, as this Court has admitted its "interpretations [of § 8(a)(3)] are not obvious," *Marquez*, 119 S. Ct. at 300, the possibility and probability that such clauses will be used to coerce unsuspecting employees was left open. *Id.* at 303-04 (Kennedy, J., concurring). The uncontroverted record here establishes that the forced-unionism clause in this case was agreed to, enforced, and understood as one requiring formal union membership as a condition of employment, and was used to coerce RMC employees into membership with Local 614, as anticipated by Justices Kennedy and Thomas, thereby denying the employees their full freedom of choice under the Act.

Therefore, this Court should grant *certiorari* on this important issue regarding the liability of employers who interfere with and coerce their employees in the exercise of their Section 7 right to refrain, as well as unlawfully encourage membership in a labor organization, in violation of Section 8(a)(1) and (3), 29 U.S.C. § 158(a)(1) and (3).

II. EVIDENCE THAT RMC AND LOCAL 614 INTENDED TO REQUIRE FORMAL UNION MEMBERSHIP AS A CONDITION OF EMPLOYMENT RENDERS THE BOARD'S TREATMENT OF THEIR FORCED UNIONISM CLAUSE AN IMPROPER INTERFERENCE IN SUBSTITUTING ITS POLICY PREFERENCES FOR THE CLEARLY-DEMONSTRATED INTENT OF THE PARTIES.

The Board had an uncontroverted Record before it that RMC and Local 614 executed and enforced an agreement in which they had intended to require RMC employees to become and remain formal union members. The Record contains **no** evidence that they had used a "term of art" to impose an agency shop. *Marquez*, 119 S. Ct. at 301. Nevertheless, the panel below and the Board found that the RMC/Local 614 forced-unionism clause was a lawful and enforceable forced-unionism agreement and that employees were obligated to pay full union dues unless they responded to a notice, resigned from union membership, and objected to payment of full union dues.. App. A at 7a-8a; App. B. at 16a-19a.

A. The Conflict

This Court has held that the Board has no power to alter or amend a collective-bargaining agreement to compel a company or a union to agree to any substantive contractual provision. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). This principle has been repeatedly applied by this Court,[5] the lower federal courts (including

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[5] *United Steelworkers v. Rawson*, 495 U.S. 362, 373 (1990), and *Golden State Transit v. City of Los Angeles*, 475 U.S. 608, 619 (1986).

the Sixth Circuit),[6] and by the Board.[7]

Nevertheless, the Board's decision here, as well as the panel's affirmance of it, in essence re-writes the RMC/Local 614 contract to impose a "lesser" form of forced unionism, *i.e.*, one less than the agreement to which RMC and Local 614 agreed and enforced requiring RMC employees to become and remain formal union members as a condition of continued employment.

Nothing in the Record supports the notion that what was intended by the parties was a lawful forced-unionism agreement. To the contrary, every piece of uncontroverted evidence adduced at trial clearly supports the fact that RMC and Local 614 intended, agreed to and enforced (or attempted to enforce) an agreement forcing RMC employees to become formal members of Local 614. Indeed, the Board recognizes this fact by its amended remedial order requiring the union to provide the "*Beck*" notices which it had never provided. App. B at 12a.

Absent authority to re-write the RMC/Local 614 collective bargaining agreement, though, the Board should have applied its long-standing remedy of expunging unlawful and coercive clauses. *See Stage Employees IATSE (Hughes-Avicom Int'l)*, 322 N.L.R.B. at 1065; *see also NLRB v. Manitowoc Eng'g Co.*, 909 F.2d 963, 972-73 (7th Cir. 1990) (declaring certain super-seniority language to be facially invalid and ordering it expunged); *Universal Fuels*, 298

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[6] *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217, 1232 (1st Cir. 1996); *"Automatic" Sprinkler Corp. of America v. NLRB*, 120 F.3d 612, 617 (6th Cir. 1997); *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 903 (6th Cir. 1996).

[7] *See, e.g., Teamsters Local 703 (Testa Produce)*, 320 N.L.R.B. 1184, 1184 (1996) (reversing ALJ's order as imposing a term in violation of *H.K. Porter Co.*); *see also Stage Employees IATSE (Hughes-Avicom Int'l)*, 322 N.L.R.B. 1064, 1065 (1997) (ordering expunction of clause which limited welfare and pension benefits to union members).

N.L.R.B. 254, 257 (1990) (ordering union to expunge illegal clauses from its collective bargaining agreement). Similarly, in the many "*Pattern Makers*" cases, *supra*, the Board declared "restriction on resignation" language to be facially invalid and ordered these clauses expunged from union constitutions. *See e.g., IAM Local 1414 (Neufeld Porsche Audi)*, 270 N.L.R.B. 1330, 1336-37 (1984). Instead, though, the Board rewrote the clause at issue here to defy the clearly-expressed and demonstrated intent of the parties to it.

In light of RMC's and Local 614's agreement to and enforcement of an illegal forced-unionism obligation, any conclusion that their forced-unionism clause was lawful reinterprets it in a manner unjustified by the Record. It is black-letter labor law that no financial obligation can be imposed upon bargaining unit employees in the absence of a valid collective bargaining agreement. *See, e.g., Montgomery Ward & Co.*, 121 N.L.R.B. 1552, 1558 (1958). The uncontroverted evidence in this case clearly establishes that RMC and Local 614 **never agreed** to impose a lawful forced-unionism obligation and therefore, no lawful forced-unionism obligation was ever imposed upon the RMC bargaining unit represented by Local 614.

Here, Local 614 and RMC agreed to force employees to become union members. The Board's treatment of that provision as a valid forced-unionism provision re-writes it for RMC and Local 614, contrary to *H.K. Porter Co.* Applying the normal Board remedy of expunction of the offending clause, any legal basis for forcing RMC employees to subsidize **any** of Local 614's activities is removed, and where there is no such legal basis, no such fees or dues may lawfully be exacted. *Montgomery Ward & Co.*, 121 N.L.R.B. at 1558.

This argument is what the panel below described as "no cogent argument as to why the Board erred in not requiring a total refund here." App. A at 8a. However, it is an argument rooted in the Board's own well-established record in refusing to require employees not subject to a lawful forced-unionism clause to nevertheless pay dues to a labor organization. The panel conceded that "the Board's

'choice of remedies should be set aside only if "it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act."'" App. A at 8a.[8] Nevertheless, the panel failed to recognize that, when it re-wrote the RMC/Local 614 forced-unionism clause contrary to the demonstrated intent of the parties, it was attempting to achieve ends other than those which can be fairly said to effectuate the policies of the Act. That is, while the Act authorizes unions and employers to negotiate to impose a limited forced-unionism obligation, these parties negotiated and imposed a greater obligation. The Board overlooked that uncontroverted fact, re-wrote RMC's and Local 614's agreement for them, in order to perpetuate a forced-unionism obligation. Where, as here, the parties agreed to impose an obligation on employees greater than that permitted by the Act, it cannot be said to effectuate the policies and purposes of the Act by permitting the Board to re-write that agreement to the detriment of employees whose "full freedom of association" the Act is supposed to protect. 29 U.S.C. § 151; *see also Pattern Makers*, 473 U.S. at 104-05.

B. The Importance of the Issue

Like the first question presented, this question is manifestly important, both in principle and in practice, as this Court recognized by granting *certiorari* in cases such as *Beck* and *Marquez*. It is not necessary to repeat or recast those points here, save to say that the second question presented herein affects the important policies of voluntary unionism embedded in the Act in the same way as *Beck* and *Marquez*.

Indeed, the second question may be even more important, since it raises the issue of the Board's power to interfere with the outcome

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[8] *Quoting NLRB v. Master Slack and/or Master Trousers Corp.*, 773 F.2d 77, 83 (6th Cir. 1985) (*quoting NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969).

of the voluntary bargaining of unions and employers to the detriment of individual employees, and indeed, to ignore facts which do not support its preferred outcome, a characteristic which often has been criticized by the Circuits. *See Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1079 (D.C. Cir. 1996) & 1080 (denying enforcement where "The Board ... has given no indication that it has taken the employees' section 7 rights into consideration"); *see also HarperCollins San Francisco*, 79 F.3d at 1332 (similarly criticizing Board for "flout[ing] the mandates of this Circuit and ignor[ing] ... consistent holdings"). Another Circuit has gone so far as to note that the Board exhibits a "pro-union bent" leading to "unconscionable result[s]," and that it "reject[s] evidence that does not support the Board's preferred result" through a "warped interpretation of the facts" *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 488, 494, 490 (2d Cir. 1997).

Here, as with many other so-called "*Beck*" cases, the Board delayed adjudication for years. When it finally got around to ruling in this case, it re-wrote the agreement that RMC and Local 614 obviously made and intended to enforce—one requiring RMC employees to become full union members. It then absolved RMC of most liability for its efforts to coerce employees into becoming full union members, in derogation of the exercise of their Section 7 right to refrain, and denied to Local 614 only that portion of union dues to which it was not entitled in the first place.

Whether labor unions which defy their duty of fair representation to negotiate and enforce forced-unionism clauses exceeding the limited obligation which may be imposed under Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), nevertheless are permitted to retain that portion of monies to which they would have been entitled had they not defied the legal requirements to provide notice and full disclosure to employees is vitally important. This Court's adjudication of this issue will determine union incentives to comply with the law. If the Board's remedy is reversed, and restitution is granted as ordered by ALJ Itkin and sought by Petitioner, incentives will be created to compel those unions to fulfill their duties. If, on the other

hand, the Board's remedy survives, unions like Local 614 will continue to ignore their duties, secure in the knowledge that they will be denied only that to which they were not entitled in the first place, and then, only if employees learn of their rights elsewhere, and file charges with the NLRB, and if the General Counsel issues a Complaint upon those charges..

As the Act is not self-enforcing, and particularly if this Court does not grant *certiorari* on the first question presented, this Court should grant *certiorari* on this important issue regarding the appropriate remedy to be ordered where an employer and a union agree to and enforce a forced-unionism provision exceeding their limited authority to impose forced-unionism obligations under Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3).

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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January 2000

APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

14 October 1999

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 97-5302

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES E. CECIL,	)	
	)	**ON PETITION FOR RE-**
Petitioner,	)	**VIEW OF AN ORDER OF**
	)	**THE NATIONAL LABOR**
v.	)	**RELATIONS BOARD**
	)	
NATIONAL LABOR RELA-	)	**FILED OCT 14 1999**
TIONS BOARD,	)	**LEONARD GREEN, Clerk**
	)	
Respondent	)	**NOT RECOMMENDED**
	)	**FOR FULL-TEXT PUBLI-**
and	)	**CATION**
	)	
TEAMSTERS LOCAL 614,	)	**[stamp omitted in printing]**
	)	
Intervenor.	)	
	)	

BEFORE: KEITH, BATCHELDER and DAUGHTREY, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. This case presents another chapter in the ongoing debate over exactly what union membership status labor unions and employers can require of employees, and what steps unions must take to inform workers as to what their contract terms actually mean. Because Petitioner Cecil ("Cecil") challenged the facial validity of the "union security clause" in his Collective Bargaining Agreement ("CBA"), we have held this matter in abeyance until the Supreme Court addressed that precise issue in *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 142

L.Ed.2d 242, 119 S.Ct. 292 (1998). Based on the Court's guidance in *Marquez*, and having had the benefit of oral argument and a careful review of the record in this case, we now AFFIRM the decision of Respondent, the National Labor Relations Board ("NLRB" or "Board").

[2]I. Procedural and Factual Background

Cecil began to work for his employer, Rochester Manufacturing Co. ("RMC"), in January, 1985. In early 1992, RMC entered into a CBA with Intervenor, Local 614 (the "Union") which contained a union security clause providing that

> The Employer agrees that as a condition of continued employment, all present and future employees covered by this Agreement shall become and remain members in good standing in [the Union], no later than the 31st day following the beginning of their employment.

When Cecil and other employees failed to return their membership applications and dues-withholding forms, they were threatened with termination by an RMC agent unless they refused to return these "required" documents. This was based, *inter alia*, on the agent's interpretation of the CBA that "the contract meant what it said" regarding union membership. Cecil received similar, in-person pressure from a Union representative. RMC also withheld dues from Cecil's paycheck without authorization, although these funds were later returned. At no time did the Union or RMC inform Cecil of his rights to refuse membership and to pay only those dues related to representational activity, as set out in *NLRB v. General Motors Corp.*, 373 U.S. 734, 10 L.Ed.2d 670, 83 S.Ct. 1453 (1963), and *Communication Workers v. Beck*, 487 U.S. 735, 101 L.Ed.2d 634, 108 S.Ct. 2641 (1988). The record suggests that other employees were similarly misled as to their rights to refuse or resign from union membership.

Cecil filed unfair labor practice charges with the NLRB against the Union and RMC, on behalf of himself and his entire bargaining unit, on May 20, 1992. Cecil alleged numerous violations of §§ 8(a)(1)-(3), 8(b)(1)(a) and (b)(2) of the National Labor Relations Act,

29 U.S.C. § 151 *et seq.*, challenging the facial validity of the union security clause, the actions of the Union and RMC in [3]attempting to enforce an unlawfully broad interpretation of that clause, and their failure to inform employees of their *Beck* rights. An administrative law judge ("ALJ") substantially agreed with Cecil, including his allegation that the security clause was facially invalid. The ALJ ordered RMC and the Union to expunge the clause from the CBA, refund all dues collected under it, and post notices informing employees of their rights as to union membership. All parties excepted.

Nearly a full four years later, the NLRB issued a decision partially reversing the ALJ's order. Specifically, the Board held that security clauses requiring employees to remain "members in good standing" of the union were not facially invalid, because that language could be interpreted in a manner consistent with Supreme Court precedent. The Board did, however, agree with several of the ALJ's findings. It held that the Union violated its duties by not informing Cecil of his rights as to membership and dues, and by threatening Cecil with termination. It also found RMC's conditioning of employment on return of the dues-withholding forms and its unauthorized deduction from Cecil's paycheck to be unfair labor practices. Accordingly, the Board ordered a similar remedy, except that the security clause was allowed to remain in the CBA, and dues refunds were limited to those applied to non-representational activities that were objected to by the nonmember employee.

II. Analysis

RMC and the Union have since agreed to obey the Board's order, and hence no petition for enforcement has been filed with this Court. Instead, Cecil petitions us to review the Board's order, and asks us to hold that (1) the security clause is facially misleading and unlawful; (2) the actions of RMC and the Union impermissably interfered with the employees' § 7 rights; and (3) the employees are entitled to a refund of all union dues paid while the clause was in effect. The Board and Union [4]seek to uphold the order. The Union also alleges that the case is now moot. We will address these issues in turn.

A. Mootness

The Union presents to this Court, for the first time in this action, three distinct grounds on which it alleges the case is moot: (1) Cecil's voluntary departure from RMC since initiating this action, (2) RMC's return of all money withheld from Cecil's paycheck, and (3) RMC and the Union's removal of the "membership in good standing" language from the CBA. *See* Br. for Intervenor at 1-2.

The last argument, based on the change in contract language, can be easily dispatched. It is established doctrine that a voluntary cessation of unlawful activity after the practice is challenged in court will not render the claim moot. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.14 (1986) (noting that a contrary rule would give defendants "a powerful weapon against public law enforcement"); *Weaver v. University of Cincinnati*, 942 F.2d 1039, 1042 (6th Cir.1991) (following *Hudson*). Without a decision of this Court on the merits, RMC and the Union would be free to return to their old contract language and practices, and the rights and duties of the rest of those in Cecil's bargaining unit would not receive final adjudication. These concerns "dictate that we review the legality of the practice defended before the [ALJ and Board]." *Hudson*, 475 U.S. at 305 n.14. The remaining two grounds, however, require more discussion.

Mootness has been described as "the doctrine of standing set in a time frame." Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973). There are two components to this concept: whether the issues presented remain a "live" controversy **[5]**and whether the parties retain a legally cognizable interest in the outcome. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980).

The issues in this case remain live, both because of possibility of repetition discussed above, and the unresolved question of what reimbursements the members of Cecil's bargaining unit are owed. *See Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 97 n. 2 (1958) (holding that resolution of the underlying picketing and signing of a CBA did not moot the case because picketing could resume); *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 400 n.4 (1952) (same); *United States v.*

International Brotherhood of Teamsters, 955 F.2d 171, 174 (2d Cir.1992) (relying on *Geraghty's* "flexible" mootness doctrine to rule on the propriety of an injunction limiting union campaigning, even though the injunction had been lifted and the election held, because "the issues presented [...] are of general and recurring applicability in the Labor-Management context").

We also find that the unnamed members of this bargaining unit suffice as parties with a legally cognizable interest. To reach this conclusion, we refer to the Supreme Court's decisions applying the mootness doctrine to class actions.[1] Mootness of the named party's claim has not invalidated those of the entire class since *Sosna v. Iowa*, 419 U.S. 393 (1975). This is true for all class actions, not merely those involving transient conditions that are "capable of repetition, yet evading review," and applies so long as there are some unnamed plaintiffs in the class who retain a personal stake in the lawsuit. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). Thus, we have jurisdiction [6]to render a decision in this appeal despite the satisfaction of the Charging Party's claim and his departure from the Union's bargaining unit.

We also note that Cecil might not have left his job prior to the resolution of his claim, thereby creating this mootness concern, had the Board not taken nearly four years to resolve the claim. Although the federal judiciary itself is not a monument of expeditiousness, the

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[1] We recognize that Cecil's lawsuit has never been formally certified as a proper class action pursuant to Fed.R.Civ.P. 23, as was the case in these decisions. But our research reveals no case law directly applying the mootness doctrine to suits brought before the Board on behalf of a class of persons when the claim of the original charging party has become moot. Since its inception, moreover, this case has been conducted on behalf of the entire bargaining unit, represented as to the issues presented therein by Cecil as the Charging Party. We see no functional difference, as it relates to mootness, between this process and that of typical class actions. Given the Supreme Court's own observation that their cases "demonstrate the flexible character of the Art. III mootness doctrine," *Geraghty*, 445 U.S. at 400, we are comfortable applying their decisions on mootness and class actions in this analogous context.

NLRB's snail-like pace has received considerable notoriety. To dismiss this case now as moot would invite the Board to drag its feet in other matters it finds troublesome, in an attempt to outlast the charging party's employment. This cannot be the law.

B. Facial Validity of the Union Security Clause

Unfortunately for Cecil, however, the *Marquez* decision effectively eliminates the main thrust of his argument, to wit, that the union security clause in his CBA was facially invalid.

1. Standard of Review

On a petition for review, the Board's legal conclusions are subject to de novo review, while its application of law to the facts are subject to the "substantial evidence" standard of review. *See NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 368 (6th Cir.1993). The Board's interpretation of contract terms is subject to de novo review. *See Gratiot Community Hosp. v. NLRB*, 51 F.3d 1255, 1261 (6th Cir.1995) (citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201-03, 111 S.Ct. 2215, 2223, 115 L.Ed.2d 177 (1991)).

2. Application of *Marquez*

This Court has previously agreed with Cecil that "a union-security clause that requires 'membership in good standing,' without concurrent definition of that term in the collective bargaining agreement," is inherently misleading and thus invalid. *Buzenius v. NLRB*, 124 F.3d 788, 791 (6th Cir.[7]1997), *vacated sub nom. and remanded for reconsideration in light of* Marquez, *United Paperworkers Int'l Union v. Buzenius*, 142 L.Ed.2d 397, 119 S.Ct. 442 (1998). Faced with a nearly identical clause in *Marquez*, however, the Supreme Court found that because such contracts tracked the statutory language of NLRA § 8(a)(3), they could not, standing alone, be grounds for a finding that a union has misled its workers in bad faith and violated its duty of fair representation. *See Marquez*, 119 S.Ct. at 295.

This is not to say that the language of a union security clause is irrelevant to a fair representation inquiry. As noted in a concurring opinion by Justice Kennedy and joined by Justice Thomas, the Court's "sole conclusion [was] that mere recitation of the statutory language within a security clause does not, without more," violate this duty. *Id.* at 303 (Kennedy, J., concurring). The concurring Justices recognized that evidence in addition to the clause could demonstrate bad faith, and that the language of the clause may have some bearing on evaluating the union's behavior. *See id.* They also distinguished the bad faith question at hand from a mere unfair labor practices claim, which requires a lower standard of proof and which the clause itself may substantiate. *See id.* at 304.

The facts at bar, however, do not offer us an opportunity to distinguish *Marquez*. Although the Board perhaps should have acknowledged more clearly the clause's role in misleading workers, it did find in the record several instances of unlawful coercion and misinformation by the Union and RMC, motivated in part by those parties' erroneous interpretation of the clause. The Board based its remedy on these specific instances of misconduct. In short, it did precisely what Justice Kennedy's concurrence suggested it should do. We cannot say that this was error.

[8]3. Refund of Union Dues

In addition to requesting that the clause be expunged, Cecil seeks refunds of all Union dues paid while the security clause was in effect. Although the Board has ordered all non-representational funds to which workers objected to be returned, Cecil contends that a "complete refund is necessary because employees never had any lawful obligation to pay any fees [...] and because all bargaining unit employees were coerced by the existence of the overbroad and misleading language." Petitioner's Br. at 42.

We disagree. The Supreme Court has consistently articulated for the past 50 years that the Board has the primary authority to apply the NLRA to specific situations. *See ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994). We "must give the agency's decision controlling weight unless it is arbitrary, capricious, or manifestly contrary to

the statute," even if we may have misgivings about certain aspects of the Board's approach. *Id.* (internal quotations and citation omitted). Thus, the Board's "choice of remedies should be set aside only if 'it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.' " *NLRB v. Master Slack and/or Master Trousers Corp.*, 773 F.2d 77, 83 (6th Cir.1985) (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405 (1969).

Moreover, Cecil's assertion is unsupported by authority. The Supreme Court has substantially circumscribed the amount of dues that objecting employees are required to pay. *General Motors* held that workers satisfy the "membership" requirement of a union security clause by paying the union's initiation fee and dues, while *Beck* limited this "financial core" membership to fees directly related to the union's representational activities. But the Court has never suggested that employees may exempt [9]themselves entirely from any financial obligation, and Cecil presents us with no cogent argument as to why the Board erred in not requiring a total refund here.

III. Conclusion

For the foregoing reasons, the decision of the National Labor Relations Board is **AFFIRMED**.

APPENDIX B

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

12 March 1997

and

DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

[323 N.L.R.B 260]
Rochester Manufacturing Co.
and
James Cecil
Local 614, International Brotherhood of Teamsters, AFL-CIO
and
James Cecil
Cases 7-CA-33302 and 7-CB-9219

March 12, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 31, 1993, Administrative Law Judge Frank H. Itkin issued the attached decision. The General Counsel, the Respondents, and the Charging Party filed exceptions and supporting briefs, the Charging Party filed a reply brief to the Respondents' exceptions, and the Respondent Union filed a reply brief to the Charging Party's cross-exceptions.

On June 14, 1996, the National Labor Relations Board issued a Notice and Invitation to File Briefs. Assuming without deciding that the Respondent Union unlawfully failed to give employees required notices, the Board invited the parties "to submit their views as to the appropriate remedies, including possible reimbursement remedies, for employees who were not given the proper notice; their views as to the period for any such remedies should they be given; and how to determine the class of persons to whom they should be given." The General Counsel, the Respondent Union, and the Charging Party submitted supplemental briefs.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,

findings,[1] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.[2]

I. UNFAIR LABOR PRACTICES

The judge found that the Respondents entered into and maintained a collective-bargaining agreement containing a facially unlawful union-security clause requiring unit employees to be "members in good standing" in the Union. Applying Board precedent that has issued since the judge's decision, we reject the judge's finding of a violation. However, we find that the Respondent Union violated the Act by failing to provide notice to Charging Party James Cecil and other unit employees of their rights under *NLRB v. General Motors*, 373 U.S. 734 (1963), and *Communications Workers v. Beck*, 487 U.S. 735 (1988). We find no merit in the parallel allegation against Respondent Rochester Manufacturing Co. (Rochester), but we do find that Respondent Rochester has violated the Act in a number of respects relating to its enforcement of union security.

A. *Respondent Local 614*

1. Legal principles

In *California Saw & Knife Works*, 320 NLRB 224 (1995), and *Paper Workers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995), the Board resolved a wide range of issues under the Supreme Court's *Beck* decision. These issues include the extent to

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[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

which unions which are parties to union-security clauses must apprise (1) nonmember bargaining unit employees of their *Beck* rights, and (2) all bargaining unit employees of their rights under *General Motors*, supra, to be or remain nonmembers of the union that represents their bargaining unit.

Regarding the *Beck* notice, *California Saw*, supra, held that a union violates its duty of fair representation when, in seeking to obligate employees to pay fees and dues under a union-security clause, it fails to notify bargaining unit employees who are not union members that they have the right to limit their payment of union-security dues and initiation fees to moneys spent on activities germane to their union's role as a 9(a) bargaining representative.

California Saw and *Weyerhaeuser* also addressed the separate issue of *General Motors* notice obligations: First, *California Saw* noted that the exercise of *Beck* rights is restricted to unit employees who are nonmembers, i.e., to those who have chosen not to become members of the union and whose obligations under the union-security clause are therefore limited to the "financial core" obligations of paying the union's initiation fees and dues. 320 NLRB 235 fn. 57. Second, *California Saw* observed that, without notice of *General Motors* rights, employees could be misled into believing that full union membership was required as a condition of employment. To dispel the fostering of this misconception, the Board stated that, in addition to informing nonmember bargaining unit employees that *Beck* rights accrue only to nonmembers, a union must also tell them of their *General Motors* rights to be and remain nonmembers. Id.

The Board further explained that these notice requirements furnish significant protection to the interests of individual employees covered by union-security clauses requiring "membership" in the union as to their *Beck* rights, without compromising the countervailing collective interests of bargaining unit employees in ensuring that every unit employee contributes to the cost of collective bargaining. The Board empha[**261**]sized that, in satisfying *Beck* notice obligations, a

union is afforded a wide range of reasonableness under the duty of fair representation.[3] *California Saw*, supra, 320 NLRB at 233:

> [W]e stress that the union meets [its notice] obligation as long as [the union] has taken reasonable steps to insure that all employees whom the union seeks to obligate to pay dues [under a union-security clause] are given notice of their [*Beck*] rights.

In the companion *Weyerhaeuser* decision, the Board extended these requirements and held that unions must provide *Beck* and *General Motors* notice to members as well as nonmembers. Weyerhaeuser concluded that "the rationale of *California Saw* for concomitant notice of *Beck* and *General Motors* rights applies with no less force to those who are still full union members and who did not receive those notices before they became members." Supra, 320 NLRB 349.

The "inextricable link" that *Weyerhaeuser* identified between *Beck* and *General Motors* rights was the legal predicate for the *General Motors* notice violation found in *Weyerhaeuser*. An employee necessarily must be informed of and exercise the *General Motors* right to be a nonmember before that employee can exercise *Beck* rights, for *Beck* rights apply only to nonmembers. *Weyerhaeuser* held that

> [I]n order for all unit employees subject to a union-security provision to exercise their *Beck* rights meaningfully, the law requires that notice of those rights include notice that the only way in which they can do so is to exercise the right under *General Motors* to be nonmembers. [Id. at 350.]

By failing to provide notice of both sets of rights, the Board found that the Union had violated Section 8(b)(1)(A) of the Act.

2. The Rochester unit

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[3] The same principle holds true with respect to employees' *General Motors* rights. See *Weyerhaeuser*, supra, 320 NLRB at 350.

By attacking the facial validity of "members-in-good-standing" language in the union-security clause, as executed and maintained by the Respondent Union, the complaint essentially alleges that the clause misleads employees into believing that full union membership is required. We reject this contention. In light of the Union's obligations to apprise employees of their rights to be nonmembers and to apprise nonmembers of their right to pay less than full dues and fees, there is no warrant for declaring the union-security clause unlawful on its face. The clause is clarified by the required notices. Indeed, in this case, the remedial order will require the Union to give those notices.[4] On the other hand, as discussed supra, the Respondent Union has failed to apprise employees of their *Beck* and *General Motors* rights.[5] Consistently with *California Saw* and *Weyerhaeuser*, we find that failure to be unlawful.[6]

In addition, the Respondent Union violated Section 8(b)(1)(A) when it threatened Charging Party Cecil with reprisals because of his failure to become a full member despite Cecil's protestations that he

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[4] In light of our conclusion that the union-security clause is not unlawful on its face, we dismiss all 8(a) allegations that are based on Respondent Rochester's being a party to that clause. As the Respondent Union has taken no affirmative steps to cause, or attempt to cause, Respondent Rochester to discriminate against employees in this regard, we also dismiss the related 8(b)(2) allegation.

[5] Although the complaint allegation focuses on the clause, while the finding of a violation focuses on the absence of notice, we find that the two are substantially related, so as to permit the finding. In this regard, we note that both concern the Union's duty to apprise employees of their *Beck* and *General Motors* rights.

[6] In Member Higgins' view, a union is required to give *General Motors* and *Beck* notices not only at the time when union-security obligations attach (See *California Saw*, supra at 231 and fn. 41), but also each year thereafter, in circumstances where a union requires that *Beck* objections be renewed each year in order to remain valid. See *Group Health, Inc.*, 323 NLRB 251, 255 fn. 6 (1997).

had no obligation to do so, and when it later attempted to require him to pay full initiation fees and membership dues.[7]

B. *Respondent Rochester*

We have reversed the judge's finding that Respondent Rochester entered into and maintained a facially unlawful contractual union-security provision. The judge found merit in the further allegations that Respondent Rochester violated Section 8(a)(1), (2), and (3) of the Act by advising Cecil and other unit employees that checkoff authorization forms must be filled out and that dues payment and membership in the Union are required as conditions of continued employment. Finally, the judge found that Respondent Rochester violated Section 8(a)(1) by threatening Cecil with unspecified reprisals and termination because of his failure to join the Union, and by deducting union membership dues from his wages without authorization. As set forth below, we agree only with the judge's finding that Respondent Rochester violated the Act by conditioning employment on the execution of checkoff authorization forms and by deducting dues from Cecil's paycheck without his authorization.

[262]On February 5, 1992, 4 days after the parties entered into a collective-bargaining agreement containing a union-security clause, Cecil received a dues-checkoff authorization card with his paycheck. A note was attached stating that the checkoff card "must" be filled out and returned to a union official or to management and that "[d]ues payment is required for your continued employment." On February 6, Cecil received a letter from Rochester Human Resources Manager Kris Williamson, that was addressed to him and 22 other unit

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[7] However, as described more fully in the judge's decision, Charging Party Cecil spoke in late February or early March 1992 with Union Steward John Ireland and on March 10 with Union Business Agent Cecil Powell about his intent not to join the Union or to authorize dues deductions. We cannot conclude from the record evidence that the Respondent Union's participation in any of these conversations constituted efforts by the Respondent Union to obligate Cecil to pay full membership dues and fees. We thus find that no violation of the Act occurred during these conversations.

employees, repeating the admonition that "membership in the [Union] ... is a *requirement* for continued employment at Rochester Manufacturing Company" (emphasis in original). Thereafter, Respondent Rochester deducted union membership dues from Cecil's wages without his authorization.

An employer may not lead employees to believe that the dues-checkoff authorization method of fulfilling financial obligations to their union is compulsory. *Grason Electric Co.*, 296 NLRB 872, 883 (1989); and *Mode O'Day Co.*, 280 NLRB 253 (1986). By directing employees to sign checkoff forms authorizing deductions of dues for the Respondent Union under threatened loss of continued employment, Respondent Rochester has interfered with, restrained, and coerced employees in the exercise of protected rights, in violation of Section 8(a)(1). *Mode O'Day Co.*, supra, 280 NLRB at 255. By this action, Respondent Rochester has aided and assisted the Union in violation of Section 8(a)(2) (*Baggett Industrial Constructors*, 219 NLRB 171, 172 (1975)) and discriminated against these employees in violation of Section 8(a)(3) (*Scottex Corp.*, 200 NLRB 446, 453 (1972)).

However, Respondent Rochester did not violate the Act by telling Cecil and other employees that they had to be "members" of the Union, and that "membership" and payment of "dues" can be made a condition of employment. In this regard, we note that the statute uses the term "membership," and payment of dues can lawfully be made a condition of employment. Concededly, a union has a fair representation duty to tell employees that the "membership" requirement entails only the payment of dues, i.e., full membership cannot be required. However, employers have no duty of fair representation, and thus they are not under an affirmative obligation to spell out for employees the precise extent of the union-security obligation.[8]

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[8] Of course, if the employer affirmatively gives employees an incorrect message under threatened loss of employment (e.g., payment of dues is insufficient; full membership is required) that would constitute a violation of the Act.

We also adopt the judge's findings that Respondent Rochester has violated Section 8(a)(1) by deducting membership dues from Cecil's wages without his authorization. *General Instrument Corp.*, 262 NLRB 1178 (1982) enfd. mem. 742 F.2d 1438 (2d Cir. 1983).[9]

Finally, Respondent Rochester did not violate the Act by telling Cecil that the payment of dues was a condition of employment. Concededly, Respondent Rochester did not tell Cecil of his *Beck* right to pay less than full dues. However, as discussed above, employers have no such obligation.

II. AMENDED REMEDY

A. *Scope of the Complaint*

This case represents a combination of *California Saw*, supra, and *Weyerhaeuser*, supra, in the sense that the complaint covers both the allegation that the Respondent Union failed to give all employees *General Motors* notice (*Weyerhaeuser*) and the allegation that it failed to give *Beck* notice to nonmember employees (*California Saw*). As the complaint frames the notice issues, it alleges that the Respondent

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[9] Regarding the latter violation, we note that after making an unauthorized deduction of union dues from Cecil's wages on February 27, 1992, Respondent Rochester's comptroller admitted its error in a March 4, 1992 letter and returned to Cecil the amount that had been withheld. The letter assured him that he would incur no further unauthorized dues deduction. This action, however, was inadequate for Respondent Rochester to purge itself of unlawful conduct. For such a disavowal to be effective under the Board's unfair labor practice repudiation standards of *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978), it must occur in an atmosphere that is free from other violations of the Act. Thus, Respondent Rochester is not absolved of having violated the Act in the unauthorized deduction of Cecil's dues.

We further note that, at the time of the hearing, the Respondent Union had retained none of the moneys that it had exacted from Cecil. There is insufficient evidence, however, to establish that the Respondent Union waived Cecil's obligations under the union-security clause entirely. Cf. *Laborers Local 265 (Fred A. Nemann Co.)*, 322 NLRB 294 (1996).

Union failed to give *Beck* notice to a specific class of employees—nonmembers. However, we have also found that no employee had ever been told the *General Motors* right to be a nonmember. To restrict the *Beck* remedy in this case to nonmembers would result in a situation where a segment of the bargaining unit—current members—would receive no notice of their *Beck* rights at the time that they learn, pursuant to our Order, of their right to become nonmembers. Therefore, to better effectuate the purposes and policies of the Act, we shall order the Respondent Union to extend the notice of *Beck* rights to all employees in the unit, including members of the Union.

B. *Nunc Pro Tunc Reimbursement*

In view of the extensive litigation of the issue of dues reimbursement in this case,[10] and with the benefit of a recent supplemental briefing by the parties,[11] we [263]have decided to address the significant compliance issue of what make-whole relief is appropriate for violations based on a union's failure to give employees notice of their *General Motors* and *Beck* rights. In *Weyerhaeuser*, a *Beck* reduction of dues and fees with reimbursement was ordered for an individual charging party who had been denied these notices, but who, having become aware of his statutory rights independently of information from his union, invoked them by attempting unsuccessfully to resign. The instant case presents the issue which was not addressed in *California Saw* and *Weyerhaeuser*, i.e., what is the remedy when all unit employees are either uninformed or misinformed about their rights under *General Motors* or *Beck*?

We have found that the Respondent Union violated Section 8(b)(1)(A) by failing to notify all unit employees of their rights under

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[10] Cf. *California Saw & Knife*, supra, 320 NLRB 224.

[11] The General Counsel's supplemental brief does not request a reimbursement remedy for the violations we have found. The Board is not precluded, however, from ordering a remedy that was neither given by the judge nor requested by any of the parties. See *Fieldcrest Cannon, Inc.*, 318 NLRB 470 fn. 6 (1995), enfd. in pertinent part 97 F.3d 65 (4th Cir. 1996).

General Motors to become or remain nonmembers of the Union. Thus, unit employees were kept ignorant of their rights to be nonmembers and of the rights of nonmembers under *Beck* to object to paying for union activities that are not germane to the Union's duties as collective-bargaining agent and to obtain a reduction in dues and fees for such activities.

It is the Board's practice to remedy violations of the Act by restoring, to the extent feasible, the status quo ante, reconstructing the circumstances that would have existed but for the unlawful conduct. As the Supreme Court has observed, "our task in applying Section 10(c) is to take measures designed to recreate the relationships that would have been made had there been no unfair labor practice." *Franks v. Bowman Transportation*, 424 U.S. 747, 769 (1975). In this case, it is not feasible to determine in hindsight whether individual employees, had they been fully informed of their rights under *General Motors* and *Beck*, would have chosen not to join or remain in the Union and then filed *Beck* objections as nonmembers. It is therefore impossible to establish the identity of employees who, having reflected on the relative advantages of union membership or nonmembership, would have chosen not to be union members and then requested and obtained a *Beck* reduction of dues and fees.

In order to restore the status quo ante, we shall order the Respondent Union to give all employees in the bargaining unit notice of their rights under *General Motors* and *Beck*. The *Beck* notice shall contain sufficient information, for each accounting period covered by the complaint, to enable those employees who were in the bargaining unit during those accounting periods, to decide intelligently whether to object. See, e.g., *California Saw*, supra, 320 NLRB at 253. With respect to those employees who, with reasonable promptness after receiving their notices, elect nonmember status and make *Beck* objections with respect to one or more of the accounting periods covered by the complaint, we shall order the Respondent Union, in the compliance stage of the proceeding, to process their objections, nunc pro tunc, as it would otherwise have done, in accordance with the principles of *California Saw & Knife*. The Respondent Union shall then be required to reimburse the objecting nonmember employees for the reduction in their dues and fees, if any, for nonrepresentational

activities that occurred during the accounting period or periods covered by the complaint in which the nonmember employee has objected.[12]

Concededly, it is not certain that employees who are or become nonmembers and make *Beck* objections pursuant to this remedy, would have chosen to object if they had been properly advised of their rights at the time the Union first sought to obligate them under the union-security clause. However, it is a familiar principle that the burden of resolving uncertainty must be borne by the wrongdoer.[13] The Respondent Union will have the opportunity in compliance to cut off its liability by showing, with respect to any given employee, that subsequent to the events covered by the complaint, the employee was given the required notice of its *General Motors* and *Beck* rights and that the employee declined the opportunity to elect nonmember status and become an objector. However, absent such a showing, we believe that the remedy set forth above comports with remedial principles under the Act.[14]

With respect to Respondent Rochester's deduction of dues pursuant to coercively obtained checkoff authorizations, we do not order any additional reimbursement of moneys because the affected employees were subject to a lawful union-security clause obligating them to pay dues.[15]

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[12] Charging Party Cecil had all dues he has tendered to the Union returned to him on March 4, 1992, see fn. 6, supra. Therefore, he is not entitled to any reimbursement for any moneys he tendered through the date of the hearing.

[13] *Intermountain Rural Electric Assn.* 317 NLRB 588, 590-591 (1995), enfd. mem. 83 F.3d 432 (10th Cir. 1996); and *Hamilton Electronics Co.*, 203 NLRB 206 (1973).

[14] All reimbursement remedies are subject to the limitation of Sec. 10(b) of the Act.

[15] *IBEC Housing Corp.*, 245 NLRB 1282 (1979).

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3

"3. Respondent Rochester, by advising its unit employees that union-checkoff authorization forms must be signed to retain employment, has interfered with, restrained, and coerced its employees in the exercise of Section 7 rights, and has discriminated in regard to the hire, or tenure, or terms and conditions of employment **[264]**of its employees, thereby encouraging membership in a labor organization in violation of Section 8(a)(1) and (3)."

2. Substitute the following for Conclusions of Law 6 and 7.

"6. The Respondent Union, by failing to notify unit employees, when it first sought to obligate them to pay fees and dues under a union-security clause, of their right to be and remain nonmembers; and of the right of nonmembers under *Communications Workers v. Beck*, supra, 487 U.S. 735, to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities, has violated Section 8(b)(1)(A) of the Act.

"7. The Respondent Union, by threatening James Cecil with reprisals because of his failure to join the Union and to pay full initiation fees and membership dues, and by later attempting to have Cecil pay full initiation fees and dues without providing him with notice concerning his rights as a nonmember under *Communications Workers v. Beck*, supra, has violated Section 8(b)(1)(A) and (2) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent Rochester Manufacturing Co., Rochester, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Advising employees that union-checkoff authorization forms must be signed to retain employment.

(b) Threatening to terminate employees because of their failure to become full members of the Respondent Union.

(c) Deducting union membership dues from employees' wages without the employees' written authorization for the deduction and remittance.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Rochester, Michigan facility copies of the attached notice marked "Appendix A."[16] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent Rochester's authorized representatives, shall be posted by Respondent Rochester immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent Rochester has gone out of business or closed the facility involved in these proceedings, Respondent Rochester shall duplicate and mail, at its own expense, a copy of the notice to all

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[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

current employees and former employees employed by Respondent Rochester at any time since May 20, 1992.

(b) Post at the same places and under the same conditions set forth in paragraph (a) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Union's notice marked as "Appendix B."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Rochester has taken to comply.

B. Respondent Local 614, International Brotherhood of Teamsters, AFL-CIO, Rochester, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to notify unit employees, when they first seek to obligate them to pay fees and dues under a union-security clause, of their right to be and remain nonmembers; and of the rights of nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities.

(b) Threatening employees with reprisals because of their failure to become full members of the Union, and attempting to have nonmember employees pay initiation fees and membership dues without providing them with notice of their rights as nonmembers under *Communications Workers v. Beck*, supra.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all unit employees in writing of their right to be or remain nonmembers; and of the rights of nonmembers under *Communications Workers v. Beck*, supra, to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities.

(b) Process the objections of nonmember bargaining unit employees in the manner prescribed in the remedy section of this decision.

[265](c) Reimburse, with interest, nonmember bargaining unit employees who file objections under *Communications Workers v. Beck*, supra, with the Union for any dues and fees exacted from them for nonrepresentational activities, in the manner prescribed in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amount of reimbursement to be paid union nonmember bargaining unit employees who file objections under *Communications Workers v. Beck*, supra, with the Union.

(e) Within 14 days after service by the Region, post at its business offices and meeting halls copies of the attached notice marked "Appendix B."[17] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent Union's authorized representatives, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Furnish signed copies of the notice to the Regional Director for posting by Respondent Rochester at all places on its premises where notices to employees are customarily posted. Copies of that

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[17] See fn. 16, supra.

notice, to be furnished by the Regional Director, shall, after being signed by the Respondent Union's authorized representatives, shall be returned to the Regional Director for disposition by him.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT advise employees that union-checkoff authorization forms must be signed to retain employment.

WE WILL NOT threaten to terminate employees because of their failure to become full union members.

WE WILL NOT deduct union membership dues from employees' wages without the employees' written authorization for the deduction and remittance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ROCHESTER MANUFACTURING CO.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to notify unit member employees, when we first seek to obligate them to pay dues and fees under a union-security clause, of their right to be and remain nonmembers; and of the rights of nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities.

WE WILL NOT threaten employees with reprisals because of their failure to become full members of the Union, or attempt to have nonmember employees pay initiation fees and membership dues without providing them with notice of their rights as nonmembers under *Communications Workers v. Beck*, supra.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify all member unit employees in writing of their right to be or remain nonmembers; and of **[266]**the rights of nonmembers under *Communications Workers v. Beck*, supra, to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities.

WE WILL process the objections of nonmember bargaining unit employees and reimburse, with interest, nonmember bargaining unit employees for any dues and fees exacted from them for nonrepresentational activities for each accounting period since February 1, 1992, for which they file an objection in exercise of their rights as nonmembers under *Communications Workers v. Beck*, supra.

LOCAL 614, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Jerome Schmidt, Esq., for the General Counsel.
Timothy K. Carroll, Esq., for Respondent Employer.
Wayne A. Rudell, Esq., for Respondent Union.
W. James Young, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges were filed in the above cases on May 20 and a consolidated complaint issued on August 7, 1992.[1] The General Counsel alleges in the complaint that about February 1 Respondent Employer and Respondent Union entered into and have since maintained a collective-bargaining agreement which provides:

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[1] All dates are in 1992 unless otherwise indicated.

> Art. 1, Section 2, Recognition, Union Shop And Dues. The Employer agrees that as a condition of continued employment, all present and future employees covered by this agreement shall become and remain members in good standing in Local Union No. 614, affiliated with the International Brotherhood of Teamsters of North America, no later than the 31st day following the beginning of their employment.

The General Counsel alleges that, by requiring employees to be members in good standing in the Union, the Employer has unlawfully encouraged its employees to join, support, or assist the Union. Further, by thus requiring membership in good standing in the Union as a condition of employment, the Union has caused and is causing the Employer to discriminate against employees in violation of Section 8(a)(3) of the National Labor Relations Act.

The General Counsel next alleges that the Employer, in addition, has unlawfully encouraged its employees to join, support, or assist the Union by advising unit employees in a letter dated February 6 that checkoff authorization forms must be filled out and dues payment is required for continued employment, and by advising the Charging Party and other unit employees in a letter dated February 25 that membership in the Union is a requirement for continued employment.

The General Counsel next alleges that the Employer also threatened to terminate the Charging Party about February 26 because of his failure to be a member in good standing in the Union, and deducted membership dues from the Charging Party's wages about February 27 notwithstanding the absence of the Charging Party's authorization for the deduction and remittance of membership dues.

The General Counsel next alleges that since February 1 the Union has failed to advise the Charging Party and other nonmember unit employees concerning their rights in accordance with *Communications Workers v. Beck*, 487 U.S. 735 (1988). And, further, about March 10 the Union allegedly threatened the Charging Party with reprisals because of his failure to pay union initiation fees and membership dues, and by letters dated March 20 and April 21 sought to have the Charging Party pay union initiation fees and membership dues,

without providing him with notice concerning his rights under the *Beck* decision.

In sum, The General Counsel alleges that Respondent Employer, by the foregoing conduct, has violated Section 8(a)(1), (2), and (3) of the Act, and Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act.

Respondent Employer in its answer denies violating the Act as alleged. Respondent Union in its answer also denies violating the Act as alleged.

A hearing was held on the issues raised in Detroit, Michigan on November 16 and 17. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Employer is admittedly an employer engaged in commerce as alleged, and Respondent Union is admittedly a labor organization as alleged. About February 1 the Employer and the Union entered into and have since maintained a collective-bargaining agreement (G.C. Exh. 8) which provides:

> Art. 1, Section 2, Recognition, Union Shop And Dues. The Employer agrees that as a condition of continued employment, all present and future employees covered by this agreement shall become and remain members in good standing in [the Union] no later than the 31st day following the beginning of their employment.

Charging Party James Cecil testified that he is employed by Respondent Employer as a "tool crib attendant," and that on February 6 he received with his paycheck the following document, dated February 5, from his Employer (G.C. Exh. 2):

To: All Bargaining Unit Employees

> Attached is a Teamsters Union "Check-Off Authorization" form that must be filled out, which authorizes Rochester Manufacturing Company to withhold Union dues from your paycheck.
>
> Dues payment is required for your continued employment.
>
> Return both copies to John Ireland [the Union steward] or to me [Kris Williamson, the Employer's human resources manager].
>
> Thanks for your cooperation

[267]Attached to the above document was a union-checkoff authorization and assignment form (G.C. Exh. 3).

Thereafter, on February 25, Company Human Resources Manager Williamson handed Cecil the following document which lists his name and the names of 22 other unit employees (G.C. Exh. 4), and states:

> According to our records, you have not yet returned the Teamsters Union "Check-Off Authorization And Assignment" form that was enclosed in your paycheck a few weeks ago.
>
> Let me remind you that membership in the [Union] (which includes the payment of monthly dues) is a *requirement* for continued employment at Rochester Manufacturing Company.
>
> Please fill out the form and return it to Kris Williamson in Human Resources, or to John Ireland, Union steward, no later than your Thursday (February 27) shift. [Emphasis in text.] [2]

On the following day, February 26, as Cecil further testified, Cecil went to Williamson's office. Cecil, referring to General Counsel's Exhibit 4, asked Williamson, "Will the Company fire me" if Cecil did not sign the form. Williamson responded:

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[2] G.C. Exh. 4 also recites: "cc: Payroll Union."

> The Company would not fire me [Cecil] ... the Union would direct the Company to terminate me ... within 30 days ... because I was not considered a member in good standing, because I had not signed the checkoff and paid the dues.

Cecil, "within a week's period of time," made an "appointment" and spoke with Union Steward Ireland in the foreman's office at the plant. Cecil testified:

> I went to Ireland to tell him and ask him if he wanted me to talk to the Union, or if he would direct to the Union, that I was not going to sign the check-off and join the Union. And that I would be suing the Union ... if I was terminated for not signing and joining the Union.

Ireland responded that he "would tell" Union Business Agent Cecil Powell.

In the meantime, on February 27, the Employer had deducted $16 in union dues from Cecil's paycheck. (See G.C. Exh. 6.) Thereafter, on March 4, the Employer's comptroller notified Cecil (G.C. Exh. 5):

> Since we have yet to receive your signed authorization form in order to deduct [Union] dues from your paycheck, we are returning the dues that were deducted from your paycheck dated February 27.... The Accounting Department has been instructed not to deduct any Union dues from an employee that has not signed an authorization form.

Later, on March 10, Cecil, as he further testified, spoke with Union Business Agent Powell while he was "in the tool crib" at the plant. Plant Superintendent Hershel Norris was also present. Cecil recalled:

> [Business agent Powell] made the statement ... that he understood that I did not want to belong to the Union ... [and] I said that's correct.... [Powell] asked me why I didn't want to join the Union and I told him ... I didn't need anyone else to discuss any questions that I have with the Company ... I can do that myself.... And

> then at that point he said well you think you're some kind of intellectual ... do you think you're better than those other people that are working out there. And I said no, but I do know my rights and am prepared to defend them.... I said I'm not going to sign your check-off. I am not going to join the Union. And, further, I would sue him personally and the other Union officials if I were terminated from my job.... He said to me that I would soon find out that the full force of the Union, the UAW and the other Unions, would join with him to come down on me.... And I said I'm still not going to sign your checkoff or join your Union.... I told him to do whatever it was he had to do.... Powell then said ... that I would soon see what it was I had to do ... that I would soon be hearing from him and I would know what it is, that he would direct me as to what I had to do.[3]

On March 19 Company Human Resources Manager Williamson gave Cecil a copy of the collective-bargaining agreement between the parties dated February 1 (G.C. Exh. 8), and a notice by the Employer's president (G.C. Exh. 7), stating:

> *TO ALL UNION REPRESENTED EMPLOYEES OF ROCHESTER MANUFACTURING COMPANY*
>
> As you have probably noticed, there has been a notice posted for the past few days announcing that a meeting will be held at Local 614 offices this Saturday March 21 ... at 11:00 a.m.
>
> We encourage each and everyone of you to make every effort to attend that meeting as your votes for steward and committee persons have a significant effect upon you as well as Rochester Manufacturing Company.
>
> Remember, a person that doesn't vote should have no complaint later.

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[3] Cecil later recalled that Powell, during the above confrontation, "asked me if I had ever heard of Taft-Hartley and . . . I would have to pay dues, and my answer to him was, no."

Thereafter, on March 24, Cecil received the following letter from Union Business Agent Powell (G.C. Exh. 9):

> As you know Local 614 is the certified bargaining representative for the employees at Rochester Manufacturing. I understand that you have refused to sign a checkoff authorization which would allow monthly dues to be deducted directly from your paycheck. However, still as a condition of employment you must pay such monthly fees to the Union. The monthly fees for all bargaining unit employees including yourselves is $16.00. Accordingly, please mail directly to Local 614 at the above address or deliver in person the sum of $16.00 each month said dues are due and owing by the **[268]**fifth of each month. To date the amount owed by you is $32.00 for ... February and March.

On April 24 Cecil received a similar letter certified mail from Business Agent Powell apprising him that he now owed $48 for February, March, and April dues (G.C. Exh. 10).

Cecil next testified that he has received no further notification from or had any conversation with either the Employer or the Union regarding the union- security clause or checkoff provision. Cecil noted that neither the Employer nor the Union have ever attempted to explain to him or afford him his "*Beck* rights" or explain that he has "the right to pay less than the full amount of Union dues." Cecil added that he has never "gone to the Employer or to the Union and informed them that [he is] asserting what are known as *Beck* rights" "because it is [his] understanding that it is ... the Union's responsibility to tell [him] of [his] *Beck* rights" and make such "disclosure."

On cross-examination, Cecil acknowledged that his references to his "rights" during his March 10 conversation with Union Business Agent Powell were to "[his] rights to associate with whoever [he] wants to associate with"--he had "nothing" else "particular in mind." He acknowledged that the subsequent letters from the Union concerning his arrearages do "not tell [him] that [he has] to be a member of the Union." Further, he acknowledged that, in none of his discussions with Union Business Agent Powell or Steward Ireland or Company Human Resources Manager Williamson, "did [he] suggest to any of

these people that [he was] only willing to pay a part of [his] dues" or that he "only wanted to be a financial core member or any words of that nature" or that he "wanted to exercise [his] *Beck* rights using those words." Cecil admittedly "never communicated what type of objection [he] had to [the] payment of dues to anyone ... connected with Teamsters Local 614."

Cecil also acknowledged on cross-examination that Powell "never" told him that he "had to sign a check-off card" or "become a member" and, as noted, he did not ask Powell about his "*Beck* rights" or "how the Union expends the money for dues" or "whether there were some exemptions or exceptions for employees who wish to avoid paying dues." Cecil was "at some point in time" apprised of these and related matters by the National Right to Work Legal Defense Foundation, which represents him in this proceeding.

Donald Culvey, employed by Respondent Employer, testified that he is "covered by the collective bargaining agreement"; that he joined the Union about February 13 because he, in effect, "was told [he] had to"; that he previously had attended in January a Union meeting where "we were to vote ... to accept the contract" and he "relied on" the pertinent language of the contract presented at that meeting pertaining to "Union Shop And Dues" as quoted above (G.C. Exh. 8, p. 1); that he also "learned that he was "required to join the Union or to become a member in good standing" "from the Company when the dues-checkoff list came in the pay envelope" (G.C. Exh. 2); and that he later decided that "he didn't want to be a part of the Union" after he had "learned" from coworker Cecil that he "did not have to be a member." See the correspondence pertaining to Culvey's attempted "resignation" from the Union and "revocation" of his checkoff authorization (C.P. Exhs. 1, 2, 3(a) and (b)). See also the correspondence pertaining to employee Michael Martin's attempted "resignation" and "revocation" (G.C. Exhs. 11(a), (b), (c), and (d)).

Kristie Williamson, human resources manager for the Employer, testified that she sent the Employer's notice of February 25 (G.C. Exh. 4), quoted above, to the 23 named unit employees, because

> It was my interpretation of the Union's security clause of the contract, which requires that they should become and remain members in good standing.

Previously, she had distributed the Employer's notice of February 5 and union "check-off authorization" forms (G.C. Exh. 2), quoted above, "just for administrative ease so that we could get the dues checked off in time."[4]

Union Business Agent Powell had provided her with the union "checkoff authorization" forms. The Employer continues to deduct dues from the unit employees represented by the Union; however, the Employer has placed fees and dues deducted "in an escrow account" since August, when the consolidated complaint issued in this case.

Cecil Powell, business agent for the Union, testified that he participated in an organizational drive to represent the Employer's employees commencing about April 1991; a representation election was conducted resulting in certification on June 14, 1991; meetings were held before and after certification and "persons like Cecil and Culvey were invited to attend some of these meetings"; contract proposals were discussed at a "proposal meeting" where "persons [were] allowed to ask questions about what should be in the Union security clause [or] check-off clause"; a ratification meeting was held on February 1; and "[t]he contract was read in its entirety and ... explained to the membership."

Powell assertedly did not refuse to provide anyone with "information about Union membership, payment of dues, check-off or anything

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[4] Elsewhere, Williamson explained:

> For the sake of administrative convenience, we sent the dues check-off cards to all the employees in the bargaining unit, in order to speed up the process of dues deduction.

Williamson also acknowledged that the union steward had later requested "an update of the current status of new hires . . . since the contract was ratified," and "dues check-off authorization[s] [were] distributed to the individuals on this list [C.P. Exh. 3] by the Employer."

of that nature." Prior to ratification, no employees requested such "information" and, later, at the ratification meeting, "persons such as Cecil and Culvey ... who did not want to be members ... were ... given an opportunity to attend" and "ask what questions they wished." There were no questions about "*Beck* rights" or the general "subject." There was no talk about "full membership" or any "limited obligation"--"that was never asked and [the Union] never volunteered" the "information." Powell, however, was apparently aware of the *Beck* decision at the time, but, as Powell asserted, "*Beck* was not a decision that had been clarified by the Board."

Powell next claimed that he had "accepted [Culvey's] resignation of membership," although he had never informed Culvey that he had "accepted [Culvey's] resignation." Powell insisted that Culvey never complained to him "about his dues being checked off, even after he had resigned." Powell further testified:

> **[269]**Q. [W]hen did you first hear about that ... he had tried to revoke ... and that dues were still being deducted?
> A. I received his letter to that effect.
> Q. But did you know that the Employer continued to deduct dues?
> A. I imagine there was a statement sent ... with Culvey's name.
> Q. But did he ask for any assistance?
> A. No.

Powell added that Culvey has "never asked me of any *Beck* rights as such."

Powell next testified that Cecil, "at some point in time" during their confrontation, "mentioned something about a right to work state" "he believed Michigan was an open state"; but "there was no objection" by Cecil "to paying dues"; Cecil's "statement was to the effect that he did not have to do anything in an open state." Powell admittedly had stated to Cecil that "all Unions would be concerned" about

that.[5] Elsewhere, Powell denied, inter alia, "threatening" Cecil or other employees or that he had sought their dismissal for nonpayment of dues. Powell admittedly had made no attempt to provide Cecil "with information concerning how his dues would be calculated" other than the form language provided in General Counsel's Exhibits 9 and 10, quoted above. And, the "calculations" contained in General Counsel's Exhibits 9 and 10 are the same for all unit personnel. Powell emphasized that Cecil never asked for "more information" on dues "calculations" or related matters pertaining to "membership obligations" and "check-off." Powell insisted that Cecil was not "required to accept full membership" with its "responsibilities." And, other employees, including Culvey, were never "asked" or "required" to do more than just pay the dues. Again, Powell asserted: "I have never had a person ask me about *Beck* rights."

Powell next addressed the contractual language in issue here. The "Union Shop And Dues" language, quoted above, has been repeatedly used by the Union over the past years and, as Powell testified, the term "membership" does not "require employees ... to do anything other than pay dues." Elsewhere, Powell acknowledged that he did not apprise the unit employees that "membership really didn't mean membership in the Union." Powell asserted that he did not know that the Employer was sending checkoff cards to employees in February and had not seen General Counsel's Exhibits 2 and 4, the employer notices to employees quoted above. As noted, General Counsel's Exhibit 4 indicates that a copy was sent to the Union. Employees assertedly were not "forced" by the Union to sign such cards and stewards are not authorized to take any action against employees who decline to sign such cards. Powell claimed that the Employer was never asked to solicit signatures to union checkoff cards.[6]

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[5] Cecil, on rebuttal, denied making any claim to Powell that Michigan was a "right to work state."

[6] The evidence detailed above, insofar as pertinent here, is essentially undisputed. There are, however, some conflicts in testimony. I credit the above recited testimony of Cecil and Culvey. Their testimony is substantiated in part by

Discussion

Section 7 of the National Labor Relations Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights. Section 8(a)(2) forbids an employer "to ... contribute financial or other support to" "any labor organization." And, Section 8(a)(3) forbids an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." However, Section 8(a)(3) provides that

> [N]othing in this Act ... or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) ... as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section 9(a) ... in the appropriate collective bargaining unit covered by such agreement when made.

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undisputed documentary evidence and in part by admissions of Respondents' witnesses. And, they impressed me as credible and trustworthy witnesses. On the other hand, the testimony of Powell and Williamson was at times vague, incomplete, and unclear. Powell and Williamson did not impress me as credible and trustworthy witnesses. Insofar as the testimony of Powell and Williamson conflicts with the testimony of Cecil and Culvey and documentary evidence of record, I credit the latter as representing a more reliable and complete presentation of the pertinent sequence of events.

In addition, Section 8(a)(3) further provides that

> [N]o employer shall justify any discrimination against any employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of retaining membership.

Section 8(b)(1)(A) of the Act, in turn, makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce ... employees in the exercise of" their Section 7 rights, provided, however, that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." And, Section 8(b)(2) forbids a labor organization or its agents

> [T]o cause or attempt to cause an employer to discriminate against an employee in violation of" Section **[270]**8(a)(3), or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

In *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), the issue before the United States Supreme Court was "whether an employer commits an unfair labor practice ... when it refuses to bargain with a certified union over the union's proposal for the adoption of the agency shop" and, thus, "whether the agency shop is an unfair labor practice under Section 8(a)(3) of the Act or is exempted from the prohibitions of that Section by the proviso thereto." The Court, referring to the pertinent statutory language, stated:

> These additions were intended to accomplish twin purposes. On the one hand, the most serious abuses of compulsory unionism

were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." ... Consequently, under the new law "employers will still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired," but "expulsion from a union cannot be a ground for compulsory discharge if the worker is not delinquent in paying his initiation fees or dues." [373 U.S. at 740-741.]

The Court explained:

Under the second proviso to Section 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. Membership as a condition of employment is whittled down to its financial core. [373 U.S. at 742.]

The Court concluded:

We are therefore confident that the proposal made by the union here conditioned employment upon the practical equivalent of union "membership," as Congress used that term in the proviso to § 8(a)(3). The proposal for requiring the payment of dues and fees imposes no burdens not imposed by a permissible union shop contract and compels those duties of membership which are enforceable by discharge under a union shop arrangement.

. . . .

In short, the employer categorically refused to bargain with the union over a proposal for an agreement within the proviso to Section 8(a)(3) and as such lawful for purposes of this case. By the same token, Section 7, and derivatively Section 8(a)(1),

> cannot be deemed to forbid the employer to enter into such agreements, since it too is expressly limited by the Section 8(a)(3) proviso. [373 U.S. at 743-745.]

Subsequently, in *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), the issue before the Court was "whether Section 8(b)(1)(A) reasonably may be construed by the Board as prohibiting a union from fining members who have tendered resignations invalid under the union constitution." The Court, insofar as pertinent here, noted:

> Under Section 8(a)(3), the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. See *Radio Officers v. NLRB*, 347 U.S. 17 (1954) (union security agreements cannot be used for "any purpose other than to compel payment of union dues and fees"). "Membership, as a condition of employment, is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). See also *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (under the Railway Labor Act, employees in a "union shop" cannot be compelled to pay dues to support certain union activities). Therefore, an employee required by a union security agreement to assume financial "membership" is not subject to union discipline. Such an employee is a "member" of the union only in the most limited sense. [473 U.S. at 106 fn. 16.]

The Court explained:

> Full union membership thus no longer can be a requirement of employment. If a new employee refuses formally to join a union and subject himself to its discipline, he cannot be fired. Moreover, no employee can be discharged if he initially joins a union and subsequently resigns. We think it noteworthy that § 8(a)(3) protects the employment rights of the dissatisfied member, as well as the worker who never assumed full union membership. By allowing employees to resign from a union any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union. [Id.]

The Court concluded:

> Therefore, the Board was justified in concluding that by restricting the right of employees to resign, League Law 13 impairs the policy of voluntary unionism. [Id. at 107.]

Later, in *Communications Workers v. Beck*, 487 U.S. 735 (1988), bargaining unit employees who chose not to become union members brought suit challenging the union's use of their "agency fees" for purposes other than collective- bargaining, contract administration or grievance adjustment. The union had "negotiated a union-security clause in the collective bargaining agreement under which all represented employees, including those who do not wish to become union members, must pay the union agency fees in amounts equal to periodic dues paid by union members." Under the clause, "failure to tender the required fee may be grounds for discharge." It was contended, insofar as pertinent here, that "the exaction of fees beyond those necessary to finance collective bargaining activities violates Section 8(a)(3); such ex[271]actions violate the judicially created duty of fair representation; and such exactions violate ... First Amendment rights."

The Court, noting that "we have never before delineated the precise limits Section 8(a)(3) places on the negotiation and enforcement of union- security agreements," stated:

> Taken as a whole, Section 8(a)(3) permits an employer and a union ... to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the "membership" that may be required has been "whittled down to its financial core." *NLRB v. General Motors Corp.*, [supra]. The statutory question presented in this case, then, is whether this "financial core" includes the obligation to support union activities beyond those germane to collective bargaining, contract administration and grievance adjustment. We think not.

The Court, reviewing the "historical origins" of Section 8(a)(3) and the above and related decisions, explained that in *Machinists v. Street*, 367 U.S. 740 (1961),

> [W]e held that Section 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes.... Our decision in *Street*, however, is far more than merely instructive here; we believe it is controlling, for Section 8(a)(3) and Section 2, Eleventh are in all material respects identical ... [and] we think it clear that Congress intended the same language to have the same meaning in both statutes.
>
> . . . .
>
> In *Street* we concluded "that Section 2, Eleventh contemplated compulsory unionism to force employees to share the cost of negotiating and administering collective agreements, and the cost of the adjustment and settlement of disputes," but that Congress did not intend "to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." ... We have since reaffirmed that "Congress' essential justification for authorizing the union shop" limits the expenditures that may properly be charged to nonmembers under Section 2, Eleventh to those "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative." *Ellis v. Railway Clerks*, [466 U.S. 435 (1984)]. Given the parallel purpose, structure and language of Section 8(a)(3), we must interpret that provision in the same manner.[7]

The Court concluded:

> Section 8(a)(3), like its statutory equivalent, Section 2, Eleventh, of the RLA, authorizes the exaction of only those fees necessary to "performing the duties of an exclusive representative of employees in dealing with the employer on labor-management issues."

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[7] The Court noted that "the NLRB, at least for a time, also took the position that the uniform periodic dues and initiation fees required by Section 8(a)(3) were limited by the congressional concern with free riders to those fees necessary to finance collective bargaining activities."

Consistent with the above is the often cited and quoted instruction from the United States Court of Appeals for the Third Circuit in *NLRB v. Hotel & Motel Employees Local 568*, 320 F.2d 254, 258 (3d Cir. 1963), that:

> The comprehensive authority vested in the union, as the exclusive agent of the employees, leads inevitably to employee dependence on the labor organization. There necessarily arises out of this dependence a fiduciary duty that the union deal fairly with employees.... At the minimum, this duty requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure.

Equally consistent with the above is the settled principle of labor law that a union's threat of loss of employment or like and related retaliatory consequences because the employee refuses to join the union may tend to impinge upon employee Section 7 rights and thus violate Section 8(b)(1)(A) of the Act. Cf. *Seamprufe, Inc.*, 82 NLRB 892 (1949), enfd. 186 F.2d 671 (10th Cir. 1951); and *Steelworkers Local 5163*, 248 NLRB 943 (1980). Likewise, an employer, under settled principles of labor law, may run afoul of Section 8(a)(1) and (2) of the Act "by requiring [an employee] to sign a union dues check-off authorization form ... and thereafter deducting money ... pursuant to such authorization," for, as restated in *Mode O'Day*, 280 NLRB 253 (1986), modified 290 NLRB 1234 (1990):

> The inclusion of a check-off authorization among the forms furnished employees during the hiring process may justify a finding that the employees were led to believe that the execution of such authorization was a condition of employment.

In the instant case, Respondent Union was certified as the exclusive bargaining agent of an appropriate unit of Respondent Employer's employees on June 14, 1991. Thereafter, on February 1, 1992, the Union and the Employer entered into and have since maintained a collective-bargaining agreement which expressly conditions continued employment upon the unit employees "becom[-ing] and remain[ing] members in good standing" in the Union. No attempt was made by the Union or the Employer, orally or in writing,

to apprise the unit employees, either before or after the ratification and adoption of the above union- security language, that "members in good standing" was "the practical equivalent of union membership as Congress used that term in the proviso to Section 8(a)(3)"; or that "membership, insofar as it has any significance to employment rights, may ... be conditioned only upon payment of fees and dues" and is thus "whittled down to its financial core"; or that "full union membership ... no longer can be a requirement of employment"; or, finally, that "financial core" "membership" does not "include the obligation to support union activities beyond those germane to collective bargaining, contract administration and grievance adjustment." *See General Motors Corp.*, supra; *Pattern Makers League*, supra; and *Beck*, supra.

[272]Indeed, the plain meaning of this union-security clause, read to the unit employees by union representatives, is that "full union membership" would be required in order to be a "member in good standing." Thus, this "members in good standing" language could be, and was, reasonably understood to mean that unit employees may not be delinquent to the Union in any respect. The Union's representatives, although obviously aware of the above Supreme Court holdings, avoided providing any clarification or limitation of the plain meaning of this language. As Union Business Agent Powell acknowledged, prior to ratification, no employees had requested such "information" and, later, at the ratification meeting, "persons such as Cecil and Culvey ... who did not want to be members ... were ... given an opportunity to attend" and "ask what questions they wished"; there were no questions about "*Beck* rights" or the general "subject"; there was no talk about "full membership" or any "limited obligation"; that was never asked and "[the Union] never volunteered the information."

Employee Culvey credibly testified that he is "covered by the collective bargaining agreement"; that he joined the Union about February 13 because he, in effect, "was told [he] had to"; that he previously had attended in January a union meeting where "we were to vote ... to accept the contract"; and that he had "relied on" the pertinent language of the contract presented at that meeting pertaining to "Union Shop And Dues" as quoted above. And, Culvey was not alone in this understanding that "members in good standing" meant

"full membership." The Employer's human resources manager, Williamson, acknowledged:

> It was my interpretation of the Union's security clause of the contract, which requires that they should become and remain members in good standing.

Williamson, given a supply of union-checkoff authorization forms by the Union, sent each unit employee such a form, instructing the employee that the "form must be filled out" and "dues payment is required for your continued employment." Williamson later notified those unit employees who had not promptly executed such forms:

> Let me remind you that membership in the [Union] (which includes the payment of monthly dues) is a *requirement* for continued employment at Rochester Manufacturing Company.

Copies of these notices were also sent by Williamson to "payroll" and the "Union."

Employee Cecil credibly testified that he subsequently went to Williamson's office and asked Williamson, "Will the Company fire me" if Cecil did not sign the form. Williamson warned:

> The ... Union would direct the Company to terminate [the employee] ... within 30 days ... because [he] was not considered a member in good standing, because [he] had not signed the check-off and paid the dues.

The Employer in fact had deducted Union "dues" from the Cecil's paycheck of February 27 although he had not signed the authorization form.

Employee Cecil credibly recalled how he complained to Union Steward Ireland in the plant foreman's office that he "was not going to sign the check-off and join the Union ... [and] would be suing the Union ... if ... terminated for not signing and joining the Union." No attempt was made to explain his limited "membership" obligation. Cecil later met with Union Business Agent Powell in the plant

superintendent's office. Powell pointedly asked Cecil "why [he] didn't want to join the Union." Cecil made clear his opposition to union membership and again warned that he would sue "if terminated." Again, Powell made no attempt to apprise the employee of his limited "membership" obligation. Instead, Powell berated the employee in front of the plant superintendent and threatened the employee that he "would soon find out that the full force of the Union, the UAW and the other Unions, would join ... to come down on" him. Later, Powell repeatedly wrote the employee for his "monthly fees" which were "a condition of employment." Again, Powell made no attempt to apprise the employee of his limited "membership" obligation.

The Employer also continued in this "full membership" understanding of the "members in good standing" language. Williamson acknowledged that the union steward had later requested "an update of the current status of new hires ... since the contract was ratified," and "dues check-off authorization[s] [were] distributed to the individuals on this list [C.P. Exh. 3] by the Employer." Further, the Employer also notified members and nonmembers alike that,

> [W]e encourage each and everyone of you to make every effort to attend that [union] meeting as your votes for steward and committee persons have a significant effect upon you as well as Rochester Manufacturing Company.
>
> Remember, a person that doesn't vote should have no complaint later.

And, as employee Culvey credibly testified, he later decided that "he didn't want to be a part of the Union" after he had "learned" from coworker Cecil that he "did not have to be a member." See the correspondence pertaining to Culvey's attempted "resignation" from the Union and "revocation" of his checkoff authorization (C.P. Exhs. 1, 2, 3(a) and (b)). Union Business Agent Powell never apprised Culvey that his "resignation" was "accepted," and the Employer continued to deduct the "dues." See also the correspondence pertaining to employee Michael Martin's attempted "resignation" and "revocation." (G.C. Exhs. 11(a), (b), (c), and (d).)

I find and conclude that Respondent Employer, by thus entering into and maintaining a collective-bargaining agreement requiring its employees to "become and remain members in good standing" in the Union, by advising its unit employees that union-checkoff authorization forms must be filled out and dues payment is required for their continued employment, and by advising its unit employees that membership in the Union is a requirement for continued employment, has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, and has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees thereby encouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act, as alleged. See *General Motors Corp.*, supra; *Pattern Makers League*, supra; and *Beck*, supra. Further, I [273]find and conclude that Respondent Employer, by thus advising its unit employees that union- checkoff authorization forms must be filled out and dues payment is required for their continued employment, and by advising its unit employees that membership in the Union is a requirement for continued employment, has rendered unlawful assistance and support to the Union, in violation of Section 8(a)(1) and (2) of the Act, as alleged. See *Mode O'Day*, supra. In addition, I find and conclude that Respondent Employer, by thus threatening to terminate employee Cecil because of his failure to be a "member in good standing in the Union," and by deducting union membership dues from his wages notwithstanding the absence of an authorization for the deduction and remittance of such dues, has further interfered with, restrained and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act, as alleged. See *Mode O'Day*, supra.

Likewise, I find and conclude that Respondent Union, by thus entering into and maintaining a collective-bargaining agreement requiring the unit employees to "become and remain members in good standing" in the Union, by failing to advise Cecil and other nonmember unit employees concerning their limited membership rights as explained in *Beck*, supra, by threatening Cecil with reprisals because of his failure to join the Union and pay initiation fees and membership dues, and by later attempting to have Cecil pay initiation fees and membership dues without providing him with notice concerning his limited membership rights as explained in *Beck*, supra, has restrained

and coerced employees in the exercise of their Section 7 rights, and has attempted to cause an employer to discriminate against its employees in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(1)(A) and (2) of the Act, as alleged. See *General Motors Corp.*, supra; *Pattern Makers League, supra*; *Beck*, supra; *NLRB v. Hotel & Motel Employees Local 568*, supra; *Seamprufe, Inc.*, supra; and *Steelworkers Local 5163*, supra.

Counsel for Respondent Employer and Respondent Union argue that the "members in good standing" language challenged here has been "Board approved" over the years. However, I do not deem the cited cases as controlling because they either precede the Supreme Court's explication of employee nonmember rights in *Beck*, supra, or because they fail to focus sufficiently on the issue specifically raised here.

In addition, counsel for Respondent Union argues that the General Counsel's case is defective because "no evidence was presented" that the Union "expended any part of dues collected for nonrepresentation-al activity" and that "any nonmember ... objected in a legally cognizable manner." [8] Counsel for Respondent Union cites, inter alia, *Chicago Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), and related cases, in support of this argument. In *Hudson*, supra, the Court explained:

> The *Ellis* case, [supra,] was primarily concerned with the need "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." ... In contrast, this case concerns the constitutionality of the procedure adopted ... to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn.

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[8] The Union, Local No. 614, affiliated with the International Brotherhood of Teamsters of North America, does not argue here that it does not in fact expend exacted funds for noncontractual or nonrepresentational matters.

Although the Court restated that "dissent is not to be presumed—it must be affirmatively made known to the union by the dissenting employees," the Court also explained:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the basic distinction drawn in *Abood* [431 U.S. 209 (1977)]. [475 U.S. at 306.]

And, as restated in *NLRB v. Hotel & Motel Employees Local 568*, supra:

> The comprehensive authority vested in the union, as the exclusive agent of the employees, leads inevitably to employee dependence on the labor organization. There necessarily arises out of this dependence a fiduciary duty that the union deal fairly with employees.... At the minimum, this duty requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure. [320 F.2d at 258.]

In the instant case, the Union was aware at the outset of potential employee objectors to union membership. Nevertheless, it made no attempt to explain to the employees that "membership in good standing" was a limited membership as defined above. Later, during repeated confrontations with employee Cecil where he made clear that he would not sign a union-checkoff card and join the Union and would sue the Union if terminated "for not signing and joining the Union," no attempt was made to explain to him or other employees that "membership in good standing" was a limited membership as defined above. And, later, when the Union wrote Cecil for his arrearages in "fees," it again made no attempt to explain to him or other employees that "membership in good standing" was a limited membership as defined above.

In order for nonmember employees to articulate sufficiently an objection to a violation of their *Beck* rights, they must, under the circumstances present here, be first advised by the Union, in the performance of its fiduciary duty, of such "obligations in order that the employee may take whatever action is necessary to protect his job tenure." Ibid. The Union made no attempt here to fulfill its fiduciary obligation, and I therefore reject the above and related contentions.

CONCLUSIONS OF LAW

1. Respondent Employer is an employer engaged in commerce as alleged.

2. Respondent Union is a labor organization as alleged.

3. Respondent Employer, by entering into and maintaining a collective-bargaining agreement requiring its employees to be "members in good standing" in the Union, by advising its unit employees that union-checkoff authorization forms must be filled out and dues payment is required for their **[274]**continued employment, and by advising its unit employees that membership in the Union is a requirement for continued employment, has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, and has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees thereby encouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act, as alleged.

4. Respondent Employer, by advising its unit employees that union-checkoff authorization forms must be filled out and dues payment is required for their continued employment, and by advising its unit employees that membership in the Union is a requirement for continued employment, has rendered unlawful assistance and support to the Union, in violation of Section 8(a)(1) and (2) of the Act, as alleged.

5. Respondent Employer, by threatening to terminate employee Cecil because of his failure to be a "member in good standing in the Union," and by deducting union membership dues from his wages

notwithstanding the absence of an authorization for the deduction and remittance of such dues, has further interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act, as alleged.

6. Respondent Union, by entering into and maintaining a collective-bargaining agreement requiring the unit employees to be "members in good standing" in the Union, by failing to advise Cecil and other nonmember unit employees concerning their limited membership rights as explained in *Beck*, supra, by threatening Cecil with reprisals because of his failure to join the Union and pay initiation fees and membership dues, and by later attempting to have Cecil pay initiation fees and dues without providing him with notice concerning his limited membership rights as explained in *Beck*, supra, has restrained and coerced employees in the exercise of their Section 7 rights, and has attempted to cause an employer to discriminate against its employees in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(1)(A) and (2) of the Act, as alleged.

7. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer and Respondent Union will be directed to cease and desist from engaging in the conduct found unlawful and like or related conduct, and to post the separate attached notices. Affirmatively, the Employer and the Union will be directed to rescind and cease and desist from maintaining and enforcing the union-security clause language in the collective-bargaining agreement found unlawful. Further, because the pertinent contractual language is facially invalid and, in addition, the coercive impact of attempts to enforce this language was unitwide, full restoration of the status quo ante is necessary to effectuate the purposes and policies of the Act. Therefore, the Employer and the Union will be directed jointly and severally to reimburse all unit employees for all dues and fees paid as a consequence of this unlawful clause and conduct, together with

interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, the Union will be directed in its posted notice to apprise employee nonmembers of their rights as explicated in Beck, supra. The Union will also be directed to make additional copies of its notices available for the Employer to post with its own notices to ensure that nonmember employees are sufficiently apprised of their rights.

[Recommended Order Omitted From Publication]

[323 NLRB No. 36]

[15]On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Rochester Manufacturing Company, Rochester, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Entering into and maintaining a collective-bargaining agreement requiring employees to be "members in good standing" in the Union, Local 614, International Brotherhood of Teamsters, AFL-CIO; advising employees that union checkoff authorization forms must be filled out and dues payment is required for their continued employment; and advising employees that membership in the Union is a requirement for continued employment.

(b) Threatening to terminate employees because of their failure to be a "member in good standing in the Union," and deducting union

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

membership dues from employees' wages notwithstanding the absence of an authorization for the deduction and remittance of such dues.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[16](a) Rescind and cease maintaining and enforcing that portion of its collective-bargaining agreement with the Union requiring its employees to be "members in good standing" in the Union.

(b) Jointly and severally with the Union remit to its employees all dues and initiation fees collected as a consequence of the above provision in the collective-bargaining agreement, with interest as provided in this decision.

(c) Post at its Rochester, Michigan facility copies of the attached notice marked "Appendices A and B."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

The Respondent, Local 614, International Brotherhood of Teamsters, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Entering into and maintaining a collective-bargaining agreement requiring the unit employees of the Employer, Rochester Manufacturing Company, to be "members in good standing" in the Union: failing to advise nonmember unit employees concerning their

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

limited membership rights as explained in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); threatening employees with reprisals because of their failure to join the Union and pay initiation fees and membership dues; and attempting to have nonmember employees pay initiation fees and membership dues without providing them with notice concerning their limited membership rights as explained in *Beck*, supra.

(b) In any like or related manner coercing and restraining employees in the exercise of their Section 7 rights.

2. Take the following affirmation action necessary to effectuate the policies of the Act.

(a) Rescind and cease maintaining and enforcing that portion of its collective bargaining agreement with the Employer requiring its employees to be "members in good standing" in the Union.

(b) Jointly and severally with the Employer remit to its employees all dues and initiation fees collected as a consequence of the above provision in the collective-bargaining agreement, with interest as provided in this decision.

(c) Apprise employee nonmembers in its posted notice of their rights as explicated in *Beck*, supra.

(d) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B." Copies of said notices, on forms provided by the Regional Director for Region 7, after being signed by Respondent's representative, shall be posted by Respondent Union immediately upon receipt thereof in conspicuous places, including all places where notices to members are customarily posted, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that notices are not altered, defaced or covered by any other material. Respondent Union will also make additional signed copies of its notices available for the Employer to post with its own notices to ensure that nonmember employees are sufficiently apprised of their rights.

(e) Notify the Regional Director in writing within 20 days from the date hereof what steps have been taken to comply.

Dated, Washington, D.C. March 31, 1993.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we, Rochester Manufacturing Company, have violated the National Labor Relations Act, and has ordered us to post and abide by this notice.

WE WILL NOT enter into and maintain a collective-bargaining agreement requiring employees to be "members in good standing" in the Union, Local 614, International Brotherhood of Teamsters, AFL-CIO; advise employees that union-check off authorization forms must be filled out and dues payment is required for their continued employment; and advise employees that membership in the Union is a requirement for continued employment.

WE WILL NOT threaten to terminate employees because of their failure to be a "member in good standing in the Union," and deduct union membership dues from employees' wages notwithstanding the absence of an authorization for the deduction and remittance of such dues.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL rescind and cease maintaining and enforcing that portion of our collective-bargaining agreement with the Union requiring employees to be "members in good standing" in the Union.

WE WILL jointly and severally with the Union remit to our employees all dues and initiation fees collected as a consequence of the above provision in the collective-bargaining agreement, with interest as provided in the Board's Decision.

ROCHESTER MANUFACTURING COMPANY

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
An Agency of The United States Government

The National Labor Relations Board has found that we, Local 614, International Brotherhood of Teamsters, AFL-CIO, have violated the National Labor Relations Act, and has ordered us to post and abide by this notice.

[17]WE WILL NOT enter into and maintain a collective-bargaining agreement requiring the unit employees of the Employer, Rochester Manufacturing Company, to be "members in good standing" in our Union; fail to advise nonmember unit employees concerning their limited membership rights as explained in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); threaten employees with reprisals because of their failure to join our Union and pay initiation fees and membership dues; and attempt to have nonmember employees pay initiation fees and membership dues without providing them with notice concerning their limited membership rights as explained in *Beck*, supra.

WE WILL NOT in any like or related manner coerce and restrain employees in the exercise of their Section 7 rights.

WE WILL rescind and cease maintaining and enforcing that portion of our collective-bargaining agreement with the Employer requiring its employees to be "members in good standing" in the Union.

WE WILL jointly and severally with the Employer remit to its employees all dues and initiation fees collected as a consequence of the above provision in the collective-bargaining agreement, with interest as provided in this Decision.

WE WILL apprise employee nonmembers of their rights as explained in *Beck*, supra, as follows:

> Under the National Labor Relations Act, an employer and a union may enter into an agreement requiring all employees to

become union members as a condition of continued employment, but the burdens of union membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. Membership, as a condition of employment, is "whittled down to its financial core" and this "financial core" membership obligation does not "include the obligation to support union activities beyond those germane to collective bargaining, contract administration and grievance adjustment.

LOCAL 614, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

APPENDIX C

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 157

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 157

§ 157. **Right of employees as to organization, collective bargaining, etc.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

APPENDIX D

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 158

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 158

§ 158. **Unfair labor practices**

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later. . . .

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title:...

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . . .

Supreme Court, U.S.
FILED
MAR 13 2000
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No. 99-1173

In the Supreme Court of the United States

JAMES E. CECIL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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19pp

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that an employer does not commit an unfair labor practice when, consistent with the terms of a facially valid union security clause, it advises employees that union "'membership' and payment of 'dues' can be made a condition of employment."

2. Whether, on finding that the union unlawfully failed to notify employees of their legal rights regarding membership and payment of dues, the Board acted within its remedial discretion in ordering the union to reimburse, for dues and fees expended by the union on non-representational activities, those employees who choose objector status upon receiving notification of their rights.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the judgment is noted at 194 F.3d 1311 (Table). The decision and order of the National Labor Relations Board (Pet. App. 9a-26a) and the decision of the administrative law judge (Pet. App. 26a-57a) are reported at 323 N.L.R.B. 260.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1999. The petition for a writ of certiorari was filed on January 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA or Act) gives employees the right to engage, or "to refrain from" engaging, in activities in support of collective bargaining, such as "join[ing] * * * labor organizations." 29 U.S.C. 157. Sections 8(a)(1) and 8(b)(1)(A) make it unlawful for employers or unions, respectively, to "restrain or coerce" employees in the exercise of their Section 7 rights. 29 U.S.C. 158(a)(1), (b)(1)(A). Section 8(a)(3) prohibits employers from engaging in "discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). Under Section 8(a)(3), however, an employer and a union may contract to require as a condition of continued employment that bargaining-unit employees maintain "membership" in the union, provided that membership is available to all and that it requires only "tender[ing] the periodic dues and the initiation fees uniformly required." *Ibid.*

This Court has held that, under Section 8(a)(3), "'membership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). Only "payment of initiation fees and monthly dues," rather than formal union membership, may be required as a condition of employment. *Ibid.* This Court has also held that employees who are not formal union members may object to paying that portion of dues that supports "activities unrelated to collective bargaining, contract administration, or grievance adjustment." *Communications Workers* v. *Beck*, 487 U.S. 735, 738 (1988). Nonetheless, a union does not breach its duty of fair representation "by negotiating a union security clause that uses the

statutory language [of Section 8(a)(3)] without expressly explaining, in the agreement, the refinements introduced by * * * *General Motors* and *Beck*." *Marquez* v. *Screen Actors Guild*, 525 U.S. 33, 44 (1998).

2. In June 1991, the National Labor Relations Board (Board) certified Teamsters Local 614 (Union) as the exclusive bargaining representative of a bargaining unit of employees at Rochester Manufacturing Company (RMC). At that time, petitioner was an employee in the bargaining unit. Pet. App. 2a, 34a, 43a. In February 1992, RMC and the Union entered into a collective-bargaining agreement containing the following union-security clause:

> The Employer agrees that as a condition of continued employment, all present and future employees covered by this agreement shall become and remain members in good standing in [the Union] no later than the 31st day following the beginning of their employment.

Id. at 28a.

RMC drafted and enclosed with its employees' February 6, 1992, paychecks a document that stated, in pertinent part: "Attached is a Teamsters Union 'Check-Off Authorization' form that must be filled out, which authorizes [RMC] to withhold Union dues from your paycheck. Dues payment is required for your continued employment." Pet. App. 28a-29a. When petitioner and other employees failed to sign and return the authorization forms, RMC's human resources manager, Kris Williamson, gave them a document "remind[ing]" them that "membership in the [Union] (which includes the payment of monthly dues) is a *requirement* for continued employment at [RMC]." *Id.* at 29a. Williamson sent that document to employees based on her "inter-

pretation of the Union's security clause." *Id.* at 33a-34a.

RMC deducted $16 in Union dues from petitioner's February 27, 1992, paycheck but returned the money to him on March 4, because he had not signed the authorization form. Pet. App. 16a n.9, 19a n.12, 30a. Petitioner advised agents of the Union that he was not going to join the Union or authorize dues deductions. *Id.* at 14a n.7. Nonetheless, in March and April, petitioner received letters from the Union asserting that, "still[,] as a condition of employment you must pay such monthly fees to the Union." *Id.* at 32a. At no time did the Union or RMC inform the employees of their rights under *General Motors* and *Beck* to refrain from formal union membership and to object to dues payments other than those that support representational activities. *Id.* at 2a. Petitioner filed unfair labor practice charges against RMC and the Union with the Board in May 1992, but thereafter voluntarily left his employment with RMC. *Id.* at 4a, 26a.

3. Acting on petitioner's charges, the Board's General Counsel issued a consolidated complaint against RMC and the Union that alleged numerous violations of the Act. Pet. App. 26a-28a. The administrative law judge (ALJ) upheld the complaint's allegations. *Id.* at 26a-57a. The Board affirmed in part and reversed in part the ALJ's decision. *Id.* at 9a-26a.

a. The Board determined that RMC violated the Act in "its enforcement of union security." Pet. App. 10a. The Board found that RMC violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), "by advising its unit employees that union-checkoff authorization forms must be signed to retain employment." Pet. App.

20a.[1] The Board also found that RMC violated Section 8(a)(1) by deducting "membership dues from [petitioner's] wages without his authorization." *Id.* at 16a. The Board determined, however, that RMC did not commit an unfair labor practice by advising employees that "'membership' and payment of 'dues' can be made a condition of employment." *Id.* at 15a. The Board explained that "the statute uses the term 'membership,' and payment of dues can lawfully be made a condition of employment." *Ibid.* Further, unlike unions, "employers have no duty of fair representation, and thus they are not under an affirmative obligation to spell out for employees the precise extent of the union-security obligation." *Ibid.*[2]

The Board determined that the Union violated its duty of fair representation under Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by failing to notify employees of their rights under *General Motors* and *Beck*. Pet. App. 20a; see also *id.* at 10a-12a; *Marquez*, 525 U.S. at 43. The Board also found that the Union violated Section 8(b)(1)(A) by threatening petitioner with reprisal "because of his failure to become a full member" and "attempt[ing] to require him to pay full initiation fees and membership dues." Pet. App. 13a-14a.

Finally, the Board found that the union security clause was not facially unlawful. Pet. App. 13a. The

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[1] The Board further found that RMC's conduct "aided and assisted the Union," in violation of Section 8(a)(2), 29 U.S.C. 158(a)(2), which prohibits employers from "contribut[ing] financial or other support to" a labor organization. Pet. App. 15a.

[2] The Board made clear, however, that an employer does violate the Act "if the employer affirmatively gives employees an incorrect message under threatened loss of employment (e.g., payment of dues is insufficient; full membership is required)." Pet. App. 15a n.8.

Board explained that the clause would not "mislead[] employees into believing that full union membership is required" because the Union must "apprise employees of their rights to be nonmembers and * * * apprise nonmembers of their right to pay less than full dues and fees." *Ibid.*

b. As a remedy, the Board ordered RMC to cease and desist from "[a]dvising employees that union-checkoff authorization forms must be signed to retain employment," "[t]hreatening to terminate employees because of their failure to become full members of [the Union]," "[d]educting union membership dues from employees' wages without the employees' written authorization," and coercing employees "[i]n any like or related manner." Pet. App. 21a. The Board ordered the Union to notify the employees of their rights under *General Motors* and *Beck*. *Id.* at 23a. The Board further ordered that, "[w]ith respect to those employees who, with reasonable promptness after receiving their notices, elect nonmember status and make *Beck* objections with respect to one or more of the accounting periods covered by the complaint, * * * [the Union shall] * * * process their objections, nunc pro tunc." *Id.* at 18a. The Union "shall then * * * reimburse the objecting nonmember employees for the reduction in their dues and fees, if any, for nonrepresentational activities that occurred during the accounting period or periods covered by the complaint in which the nonmember employee has objected." *Id.* at 18a-19a.

4. Petitioner sought review of the Board's order in the United States Court of Appeals for the Sixth Circuit. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-8a.

The court concluded that *Marquez*, which postdated the Board's decision, "effectively eliminates the main

thrust of [petitioner's] argument, to wit, that the union security clause in his [collective bargaining agreement] was facially invalid." Pet. App. 6a. The court explained that, before *Marquez*, it had concluded that a union security clause requiring "membership in good standing" is "inherently misleading and thus invalid" if the collective bargaining agreement does not contain "[a] concurrent definition of that term." *Ibid.* However, the court concluded that its prior reasoning was no longer viable in light of *Marquez*, in which this Court held that contracts that "track[] the statutory language of NLRA § 8(a)(3)" cannot, "standing alone, be grounds for a finding that a union has misled its workers in bad faith and violated its duty of fair representation." *Ibid.*

The court also considered the point made in Justice Kennedy's concurring opinion in *Marquez*—that a union security clause, valid on its face, might be enforced in a manner that breaches the union's duty of fair representation or constitutes an unfair labor practice. Pet. App. 7a.[3] The court concluded that the Board "did precisely what Justice Kennedy's concurrence suggested it should do." *Ibid.* It found "several instances of unlawful coercion and misinformation by the Union and

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[3] In his concurrence, Justice Kennedy (joined by Justice Thomas) explained that the Court had not addressed "circumstances in which there is evidence that a security clause such as this one was used or intended to deceive or injure employees." 525 U.S. at 52. Thus, "inclusion of the statutory language" would be no defense for the union "when a violation of the fair-representation duty has been alleged and facts in addition to the bare language of the contract have been adduced to show the violation." *Id.* at 52-53. "Furthermore, we do not have before us the question whether use of this language, in some circumstances, might be an unfair labor practice even though, without more, it is not a breach of the duty of fair representation." *Id.* at 53.

RMC, motivated in part by those parties' erroneous interpretation of the clause," and it "based its remedy on these specific instances of misconduct." *Ibid.*

The court rejected petitioner's contention that the Board should have ordered the Union to refund to employees "all Union dues paid while the security clause was in effect." Pet. App. 7a-8a. The court explained that, although *General Motors* and *Beck* "substantially circumscribed the amount of dues that objecting employees are required to pay," this Court "has never suggested that employees may exempt themselves entirely from any financial obligation." *Id.* at 8a.

ARGUMENT

The unpublished decision of the court of appeals is correct, and it does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioner concedes (Pet. 15) that, under *Marquez*, employers and unions "are permitted to mimic the statutory language permitting a 'membership' requirement in writing their forced-unionism agreements." Thus, petitioner does not challenge the court of appeals' ruling that the union security clause in this case is facially valid. Instead, petitioner contends (Pet. i (Question 1), 10-16) that this Court's review is necessary to establish that an employer violates the NLRA if, in reliance on such a clause, the employer attempts to force employees to become formal union members. As we explain below, the Board and the court of appeals accepted the principle that petitioner seeks to establish and disagreed with petitioner only as to how it should be applied here. Petitioner's contention thus raises no issue warranting this Court's review.

Based on the record in this case, the Board found that RMC made two representations to employees respecting their obligations under the union security clause: RMC advised employees that they were required as a condition of employment to execute the Union's dues-checkoff authorization forms; and RMC advised employees that "'membership' and payment of 'dues' can be made a condition of employment." Pet. App. 14a-15a. The Board determined that RMC's handling of the dues-checkoff forms violated the Act in several respects. RMC's advising employees to sign the dues-checkoff forms under threatened loss of employment "coerced employees in the exercise of" their Section 7 right not to join the Union, contrary to Section 8(a)(1) of the Act, and discriminatorily "encourag[ed] membership in a labor organization," contrary to Section 8(a)(3). Pet. App. 15a, 20a. RMC therefore also "aided and assisted the Union in violation of Section 8(a)(2)." *Id.* at 15a. The Board further concluded that RMC unlawfully coerced petitioner in his right not to join the Union by withholding union dues from him without his authorization. See *id.* at 16a. The Board therefore issued a broad cease and desist order, which prohibits RMC from coercing employees to "become full members of the * * * Union." *Id.* at 21a.

The Board's decision and order are thus fully consistent with petitioner's proposition (Pet. 10, 11, 16) that an employer cannot lawfully enforce a facially valid union security clause in a manner that coerces employees to become "formal union members." The court of appeals also recognized that principle in affirming the

Board. See Pet. App. 7a (record contained several instances of "unlawful coercion" by RMC and Union).[4]

To the extent petitioner further contends (Pet. 15) that the Board should have deemed unlawful RMC's statement to employees that "'membership' and payment of 'dues' can be made a condition of employment" (Pet. App. 15a), the Board properly rejected that contention. As the Board explained, "the statute uses the term 'membership,' and payment of dues can lawfully be made a condition of employment." Pet. App. 15a; see 29 U.S.C. 158(a)(3). "The relevant provisions of § 8(a)(3) have become terms of art; the words and phrasing of the subsection now encompass the rights * * * announced in *General Motors* and *Beck*." *Marquez*, 525 U.S. at 46. Just as a union does not breach its duty of fair representation by negotiating with the employer a union security clause that uses the statutory language, *id.* at 43-44, the employer does not "coerce" or discriminatorily "encourage" employees to join the union, in violation of Sections 8(a)(1) and 8(a)(3), by reiterating the terms of that clause to employees.

Moreover, to the extent petitioner contends (Pet. 15-16) that an employer cannot lawfully apply a facially valid union security clause without simultaneously explaining to employees their rights under *General Motors* and *Beck*, that contention is also without merit. It cannot be squared with *Marquez*'s holding that a

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[4] Accordingly, there is no merit to petitioner's contention (Pet. 11) that the decision of the court of appeals allows employers "to **en**courage collective activities," thereby creating a "conflict" with other court decisions (Pet. 11-13) involving "the vigorous prosecution of employers **dis**couraging employee collective activities." As discussed in the text above, the Board found that RMC unlawfully encouraged employees to join the Union in applying the union security clause, and the court of appeals affirmed the Board.

union security clause that tracks the statutory language is valid and capable of being enforced as written. See 525 U.S. at 46. Moreover, requiring the employer to notify its employees of their *General Motors* and *Beck* rights is unnecessary because the union is obligated to notify employees of those rights. See Pet. App. 10a-12a; *Marquez*, 525 U.S. at 43. Finally, there is no statutory authority to place a notification duty on the employer, because, unlike the union, the employer is not subject to a duty of fair representation. See Pet. App. 15a.[5]

2. Petitioner next contends (Pet. i (Question 2), 17-22) that the Board should have ordered the Union to refund to employees all fees and dues collected from them under the union security clause. That contention rests on the incorrect premise that RMC and the Union entered into "an illegal forced-unionism obligation" (Pet. 19) in this case. From that premise, petitioner argues (*ibid.*) that the Board should have expunged the union security clause, thereby removing "any legal basis for forcing RMC employees to subsidize **any** of [the Union's] activities." But the Board and the court of appeals rejected that premise when they concluded that the union security clause in this case was facially valid (a conclusion that petitioner does not directly challenge). Pet. App. 6a, 13a. Although RMC and the Union enforced the valid clause in an unlawful manner,

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[5] As the Board noted in its decision, however, an employer does violate the Act if it "affirmatively gives employees an incorrect message under threatened loss of employment," such as by informing them that they are required to become formal union members. See note 2, *supra* (citing Pet. App. 15a n.8).

expunction of a valid contractual provision is not an appropriate remedy for such a violation.[6]

The Board's order requires the Union to notify RMC's employees of their rights under *General Motors* and *Beck*, and then to reimburse those employees who elect nonmember status and file objections for any dues and fees expended by the Union for nonrepresentational activities during the accounting periods covered by the complaint. Pet. App. 18a-19a. The Board reasonably concluded that this remedy was the most appropriate way to restore the status quo ante, because the Board could not feasibly "determine in hindsight" the choices that individual employees would have made if they had been timely notified of their rights. *Id.* at 18a. The court of appeals properly afforded deference to the Board's choice of remedy. See *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969) (Board acts within its discretion when it fashions "remed[ies] designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act"); *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994) (Board's remedial views "merit the greatest deference").

There is no merit to petitioner's contention (Pet. 17-18) that the Board's remedial order in this case "in essence re-writes the RMC/Local 614 contract to

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[6] The authorities cited by petitioner (Pet. 18-19) address appropriate remedies when a contractual or other provision is found to be facially unlawful. See, *e.g.*, *IAM Local Lodge 1414 (Neufeld Porsche-Audi, Inc.)*, 270 N.L.R.B. 1330, 1337 (1984) (ordering union to expunge a constitutional provision that unlawfully restricted employees' right to resign from membership); *Universal Fuels, Inc.*, 298 N.L.R.B. 254, 257 (1990) (ordering employer to expunge from collective bargaining agreement an overbroad definition of "just cause" for discipline).

impose a 'lesser' form of forced unionism," contrary to *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). In *H.K. Porter*, this Court concluded that, in fashioning remedies for unfair labor practices, the Board "is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." *Id.* at 102. Here, however, the Board's remedy neither "rewrites" the parties' agreement nor imposes any contractual terms upon RMC or the Union. Rather, the Board's order leaves in place the facially valid union security clause. See Pet. App. 20a-26a.

Nor is there merit to petitioner's argument (Pet. 21) that the Board's remedy gives unions insufficient "incentives to comply with the law" because, under the Board's order, unions are permitted "to retain that portion of monies to which they would have been entitled had they not defied the legal requirements to provide notice and full disclosure to employees." As this Court has explained in a similar context, "no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining." *Railway Clerks* v. *Allen*, 373 U.S. 113, 122 (1963). Petitioner's proposed remedy would do precisely that by depriving the Union of dues to which it has a right under the Act and which are necessary to support its collective bargaining activities.[7]

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[7] See *Gilpin* v. *AFSCME*, 875 F.2d 1310, 1314-1315 (7th Cir.) (a proposed remedy that would have required union to refund money "necessary * * * to defray costs properly incurred by the union in representing nonmembers in collective bargaining" would be "a severely punitive remedy * * *, not one properly described as restitution at all"), cert. denied, 493 U.S. 917 (1989).

In short, the decision of the court of appeals properly implements the principles recently expounded by this Court in *Marquez*. The petition presents no reason why this Court should undertake to duplicate that effort.

3. Finally, this Court's review in this case is particularly unwarranted because resolution of the issues raised by the petition would be of no practical significance to petitioner. After filing charges with the Board, petitioner voluntarily left his employment with RMC; the $16 that was withheld from his paycheck was returned to him in March 1992; and RMC and the Union have removed the "membership in good standing" language from the collective bargaining agreement (although they were under no legal compulsion to do so). See Pet. App. 4a, 16a n.9, 19a n.12, 30a. Under those circumstances, petitioner does not retain an adequate stake in further litigation of the issues that he has raised. See *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) ("Parties must continue to have a 'personal stake in the outcome' of the lawsuit" "through all stages of federal judicial proceedings.").[8]

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[8] The court of appeals nonetheless concluded that the case is not moot. The court reasoned that petitioner is effectively acting as the class representative of the rest of the employees in the RMC bargaining unit, even though the case has never been certified as a class action. See Pet. App. 4a-5a & n.1. But see *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 430 (1976) (formal certification as class action necessary). Whether or not the conclusion of the court of appeals is correct, this Court should await a case in which the petitioner retains a significant interest in the outcome to address any issues raised by the petition that warrant review. Cf. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962) (personal stake in outcome of controversy "assure[s] that concrete adverseness which sharpens the presentation of issues").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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